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Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

AVAILABILITY OF BOUND VOLUMES

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 175

(T.D. 85-192)

Decision on Domestic Interested Party Petition Concerning Tariff Classification of Imported Vehicle Known as a "Unimog"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Decision concerning a domestic interested party petition.

SUMMARY: Customs has completed its review of a petition filed by a domestic interested party, seeking reclassification of an imported vehicle known as a "Unimog". The petitioner contends that the vehicle is currently incorrectly classified by Customs under a duty-free provision of the Tariff Schedules of the United States (TSUS) for tractors suitable for agricultural use. The petitioner believes that it should be reclassified under any of three provisions of the TSUS, all of which carry varying rates of duty. Following review of the petition and the response to a solicitation of public comments, Customs has concluded that one of the alternative provisions urged by the petitioner is correct and that future importations of the "Unimog" should be classified under the tariff provision for other tractors.

DATES: This decision will be effective with respect to merchandise entered, or withdrawn from warehouse, for consumption after 30 days from the date of publication of this notice in the CUSTOMS BULLETIN, dated December 18, 1985.

FOR FURTHER INFORMATION CONTACT: John L. Valentine, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8181).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On September 24, 1984, a notice was published in the Federal Register (49 FR 37506), stating that a petition had been filed on behalf of an American manufacturer of rotary snow blowers and snow removal equipment under § 516, Tariff Act of 1930, as amend-

ed (19 U.S.C. 1516), requesting the tariff reclassification of two models of imported vehicles known as "Unimogs" which are manufactured in West Germany by Daimler-Benz AG and are imported by Mercedes-Benz of North America.

The vehicles are the "Unimog" models U900 and U1200, formerly known as models U406 and U424, respectively. Each vehicle is essentially a chassis with a cab which is designed primarily for pushing or pulling or operating implements by means of power take-offs. The essential differences between the two vehicles relate to the size of each model. The U1200 weighs approximately 9,920 pounds and the U900 weighs approximately 7,715 pounds. The U1200 may include a different transmission than the U900. The 4-wheel drive function in each vehicle may be activated while the "Unimog" is in motion and, owing to a short wheel base, each has a short turning radius. The vehicles have differential locks on both axles and fully synchronized 8 or 20 speed transmissions which permit operation at speeds between 4 feet per minute (crawler speed) and 46 miles per hour. The hydraulic system operates at approximately 2500 pounds per square inch, the pressure at which most agricultural power implements are designed to operate. Each vehicle has three attachment points for accessory implements such as sprayers, plows, disc harrows, etc. These attachment points are called power take-offs (PTO's) and they are located at the front, center, and rear of the "Unimog."

Since 1964, the described vehicles have been classified under an established and uniform practice as tractors suitable for agricultural use, currently item 692.34, Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202), a duty-free provision. This classification, which was contained in Customs ruling letter CD 434.1 A (April 15, 1964), was based upon advertising literature for the "Unimog" and upon a statement that 10 of 50 of the vehicles were "actually used" for agricultural purposes.

As explained in the notice of September 24, 1984, the petitioner's argument for reclassification is based primarily on a comparison of the "Unimog" with an agricultural tractor. The petitioner's contentions are that "Unimogs" are not used for agricultural purposes in any significant numbers, need licenses for highway use in California whereas agricultural tractors do not, can attain much higher speeds than agricultural tractors, and are capable of many sophisticated uses compared to the "simple push-pull" functions of an agricultural tractor.

The petitioner also argues that "Unimogs" should be classified like other 4-wheel drive trucks and believes the current classification is failing to provide the protection to domestic manufacturers usually provided by tariff laws.

As alternatives to classification under item 692.02, TSUS, the provision for "automobile trucks valued at $1,000 or more", currently dutiable at 25 percent ad valorem under item 945.69, TSUS,

the petitioner also believes the "Unimog" could properly be reclassified under item 692.35, TSUS, as an "other tractor", dutiable at 3 percent ad valorem, or under item 678.50, TSUS, as "a machine not specifically provided for", dutiable at 4 percent ad valorem. Either alternative, in the petitioner's opinion, would more accurately reflect the "Unimog's" sophistication and its infrequent use for agricultural purposes, characteristics not taken into account in the current classification.

Analysis of Comment and Discussion of Issues

Only one comment was received in response to the September 24, 1984, notice.

Standing Under 19 U.S.C. 1516

One point raised by the commenter is whether the petitioner has legal standing to petition for reclassification under § 516, Tariff Act of 1930, as amended (19 U.S.C. 1516). Section 516 requires that in order to be considered a domestic interested party under the statute, one must be "a manufacturer, producer, or wholesaler in the United States; * * * of goods of the same class or kind as the designated imported merchandise." The commenter alleges that the petitioner in this case manufactures a product different in class or kind from the "Unimog."

Clarification was provided by the petitioner with regard to its product which is manufactured or produced in the U.S. The petitioner is a domestic producer of a unit called a "Double-Ender." The "Double-Ender" is essentially a tractor base designed to operate several different attachments. These attachments consist of rotary snow removal heads, snow blades, brooms, and sand-snow buckets. The "Double-Ender" is a single engine power unit of articulated design with planetary axles. It is capable of speeds up to 35 miles per hour.

Although the petitioner does not sell the tractor base for the "Double-Ender" without attachments, the petitioner is, in fact, a producer of a vehicle which is similar to the imported "Unimog." It is capable of pushing or pulling or operating different types of attachments. Although it is not as versatile as the "Unimog," for purposes of § 516 the tractor base produced by the petitioner is of the same class or kind as the imported "Unimog." *Star-Kist Foods, Inc.* v. *United States,* 45 CCPA 16, C.A.D. 666 (1957) reversing 37 Cust. Ct. 171, C.D. 1819 (1956). As noted by the court in *Star-Kist, supra,* the term "same class or kind" is not meant to be equated with the requirement that the articles in issue be classifiable under the same tariff provision. What is important is the fact that an imported article, in its condition as imported, is competitive with a domestic producer's article. It is our conclusion that the requirements of § 516 are satisfied with regard to the standing of the petitioner.

AGRICULTURAL USE

The commenter argues against reclassification by stating that the design and characteristics of the "Unimog" include the following features that make it clearly suitable for agricultural use: 4-wheel drive; differential lock on each axle; crawler speeds; ASAE standard front, rear, and center power take-offs; ASAE hydraulic pressure system; 3-point hitch option; wheel track that is equivalent to standard furrow distances; short turning radius; economical small diesel engine; and other features relevant to a vehicle that is a tractor rather than a truck.

All of these features, no doubt, make a tractor capable of use in agriculture. To this point, the commenter has provided statements by users that the "Unimog" is used as an agricultural tractor. However, actual use is not conclusive. Although the test is not one of chief use, there must be at least substantial use. *Pettibone Westrac* v. *United States*, 70 Cust. Ct. 100, C.D. 4414 (1973). Substantial use has been described not as a term resurrecting "chief use," but as the antithesis of "casual, incidental, exceptional, or possible" use. *F. W. Myers & Company, Inc.* v. *United States*, 59 Cust. Ct. 445, C.D. 3182 (1967).

In this case, the actual, practical, and commercial fitness must indicate that a viable market exists for such a vehicle as an agricultural tractor. From the evidence submitted by the commenter, which only addresses importations from 1969 to 1974, approximately 13 percent of the "Unimogs" imported under item 692.34, TSUS, were said to be sold to persons engaged in agriculture (but not verified as to the use of the "Unimog" in agriculture), with the remainder sold to such diverse users of industrial tractors as mining companies, state and local governments, ski resorts, telephone companies, tree companies, chemical companies, utility companies, various individuals, ranchers, the Coast Guard, stock farms, and others. In 1964, the statement was accepted by Customs that 10 of the 50 "Unimogs" imported into the U.S. were sold to persons engaged in agriculture. Assuming that such uses were in agricultural pursuits, the facts indicate that the incidence of use in agriculture declined from 20 percent to 13 percent by 1974. Although the information was requested, no evidence was available concerning the relevant commercial market for the "Unimog" since 1974.

The history of development of the "Unimog" points to a specific need in Europe for a small tractor that could provide multiple service: as an agricultural tractor, as a truck tractor, as a power source for industrial equipment, or any other conceivable use involving a motor vehicle or machinery. In fact, a farmer could use the "Unimog" as a tractor, a truck, or construction equipment.

However, the European market is not necessarily determinative of the U.S. market for purposes of determining whether a "Unimog" is "suitable for" agricultural use within the meaning of the tariff schedules. The test is stated in the conjunctive: actually,

practically, and commercially fit for such use. As indicated by the court in *Pettibone Westrac, supra,* actual use may not be sufficient. More importantly, the use must be a substantial use. Substantial use is the necessary measure by which one can demonstrate that a tractor is practically and commercially fit for the named purpose. For that reason, the court in *Pettibone Westrac* held that the D8 and the D9, although actually used for certain types of agricultural operations, were not "suitable for" agricultural use within the meaning of item 692.34, TSUS.

The commenter also notes that the "Unimog" has satisfied the "Nebraska tractor test." However, this test is not conclusive evidence that the tractor is "suitable for" agriculture within the meaning of the tariff schedules, but, rather that it meets certain performance standards. The test should be placed in perspective. That is, satisfactory compliance with the test standards establishes the fact that a tractor may be sold in Nebraska as an agricultural tractor, but that fact does not establish that it will be or actually is a commercially viable agricultural tractor.

Reclassification as an Automobile Truck

In response to the petitioner's urging that the "Unimog" be reclassified as an automobile truck in item 692.02, TSUS, the commenter states that tariff terms are to be defined by their common meaning, which is presumed to be the same as the commercial meaning, unless there is a contrary legislative intent or a different commercial designation. The common meaning of the term "truck" has been defined in various judicial opinions: *Coles Cranes, Inc.* v. *United States,* 32 Cust. Ct. 108, C.D. 1590 (1954); *American-La France Fire Engine Co., Inc.* v. *Riordan,* 6 Fed. 2d. 964 (1925); and *United States* v. *Volkswagen of America,* 61 CCPA 29, C.A.D. 1113 (1974). These decisions and the lexicographic definitions for the term "truck" are in agreement that a truck is a vehicle designed and constructed for transporting merchandise.

The design of the "Unimog" is such that it lacks the essential physical characteristics for transporting goods. Although it does have a limited cargo capacity, the design of the vehicle is such that it is primarily suitable for pushing or pulling or transporting and operating equipment. The term "tractor" is commonly known to be a vehicle which is designed to push or pull an appliance or load. It is not a vehicle designed primarily for transporting of articles, although it may be suitable for limited use in transporting articles.

Decision on Petition

It is our opinion that the "Unimog" is not properly classifiable as a tractor suitable for agricultural use. More significantly, a review of numerous earlier files and documentation indicates that the classification has never been without doubt and that the evidence of "suitable for" has been insufficiently measured. Based on our

review of the facts, we conclude that the "Unimog" is not actually, practically, and commercially fit for use within the meaning of item 692.34, TSUS, because there is an insufficient showing of a substantial use, or even the existence of a commercially viable market as an agricultural tractor. See *Pettibone Westrac, supra,* and *Wah Shang Company* v. *United States,* 44 CCPA 155, C.A.D. 654 (1957), at page 159. The fact that the "Unimog" may be capable of such use or that it is actually so used is not conclusive evidence that it is suitable for such use within the meaning of the tariff schedules.

For the foregoing reasons, we find that the "Unimog" U900 and U1200 are properly classifiable under the tariff provision for other tractors in item 692.35, TSUS. The petitioner alleged that the "Unimogs" were classifiable as trucks in item 692.02, TSUS, or, alternatively, as other tractors in item 692.35, TSUS, or as machines not specially provided for, in item 678.50, TSUS. Therefore, the petition is denied with respect to the claim of classification in items 692.02, or 678.50, TSUS, but is allowed with respect to the claim of classification in item 692.35, TSUS.

Our ruling of April 15, 1964 (CD434.1 A), and any subsequent letters referring to it, are superseded by this decision.

Because the petition is denied with respect to the classification as a truck or as machines not specially provided for, the petitioner may file a notice of its desire to contest this decision, as provided for in § 175.23, Customs Regulations (19 CFR 175.23), following notice of this decision. An importer adversely affected by this decision must follow the procedures set forth in Part 174, Customs Regulations (19 CFR Part 174), in order to protest this decision.

AUTHORITY

This notice is published under the authority of § 516(b), Tariff Act of 1930, as amended (19 U.S.C. 1516(b)), and § 175.22(a), Customs Regulations (19 CFR 175.22(a)).

DRAFTING INFORMATION

The principal author of this document was Larry L. Burton, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: November 18, 1985.

DAVID D. QUEEN,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, December 4, 1985 (50 FR 49812)]

(T.D. 85–193)

Revocation of U.S. Seaboard Marine Consultants, Inc., as a Customs Approved Public Gauger

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation.

SUMMARY: Pursuant to § 151.43(b), Customs Regulations (19 CFR 151.43(b)), U.S. Seaboard Marine Consultants, Inc., of 7235 Lindbergh Boulevard, Philadelphia, Pennsylvania 19153, was approved to gauge imported petroleum and petroleum products in all Customs districts on October 7, 1982. Notice of approval was published as T.D. 82–188 in the Federal Register on October 14, 1982 (47 FR 46051), and in the CUSTOMS BULLETIN of October 27, 1982. In order to be approved and to keep approval in force, each public gauger must notify Customs, in writing, within 60 days of any change in name, address, ownership, or financial condition. Customs has exhausted all feasible means to establish contact with U.S. Seaboard Marine Consultants, Inc., but been unable to locate them or even to determine if they are still in business.

Accordingly, the approval of U.S. Seaboard Marine Consultants, Inc., to gauge imported petroleum and petroleum products in all Customs Districts is revoked.

EFFECTIVE DATE: November 29, 1985.

FOR FURTHER INFORMATION CONTACT: Roger J. Crain, Technical Services Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington D.C. 20229 (202–566–2446).

Dated: December 2, 1985.

ROGER J. CRAIN,
Chief, Technical Section,
Technical Services Division.

(T.D. 85–194)

Revocation of Koppel Bros., Inc., as a Customs Approved Public Gauger

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation.

SUMMARY: Pursuant to § 151.43(b), Customs Regulations (19 CFR 161.43(b)), Koppel Bros., Inc., 1400 East Anaheim Street, Wilming-

ton, California 90744, was approved to gauge imported petroleum and petroleum products on November 19, 1973. Notice of approval was published as T.D. 73-318 in the CUSTOMS BULLETIN of December 5, 1973. In order to be approved and to keep approval in force, each public gauger must notify Customs, in writing, within 60 days of any change in name, address, ownership, or financial condition. Customs has exhausted all feasible means to establish contact with Koppel Bros., Inc., but has been unable to locate them. Customs has recently learned that Koppel Bros., Inc., is no longer in business.

Accordingly, the approval of Koppel Bros., Inc., to gauge imported petroleum and petroleum products in all Customs Districts is revoked.

EFFECTIVE DATE: November 29, 1985.

FOR FURTHER INFORMATION CONTACT: Roger J. Crain, Technical Services Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-2446).

Dated: December 2, 1985.

ROGER J. CRAIN,
Chief, Technical Section,
Technical Services Division.

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19 CFR Parts 162 and 171

(T.D. 85-195)

Customs Regulations Amendments Relating to Fines, Penalties, and Forfeiture Procedures

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations relating to the disposal of property seized and forfeited for violations of the Customs laws. The document results from provisions of the Comprehensive Crime Control Act of 1984 and the Tariff and Trade Act of 1984, which made changes to the Tariff Act of 1930 concerning the disposition of seized property. The amendments include revisions to both the administrative petitioning process and the summary forfeiture process.

EFFECTIVE DATE: January 9, 1986.

FOR FURTHER INFORMATION CONTACT: James S. Demb, Entry Procedures and Penalties Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5746).

SUPPLEMENTARY INFORMATION:

Background

Section 311–323 and 2304 of the Comprehensive Crime Control Act of 1984 (Pub. L. (98–473) and § 213 of the Tariff and Trade Act of 1984 (Pub. L. 98–573), made various changes to the Tariff Act of 1930 with regard to the forfeiture and disposition of property seized by Customs. These changes include the expanded use of administrative forfeiture proceedings to permit the Government to perfect title to seized property more quickly, without having to resort to lengthy judicial proceedings; the transfer of forfeited property to other federal agencies and state and local law enforcement agencies which participated in the seizure of the property; and more expedited procedures for the disposition of seized property. These changes are intended to reduce Customs costs for seizure and storage of seized property and the processing of penalty and forfeiture cases resulting from the seizure of the property.

To aid in the expeditious processing of these cases, this document amends Parts 162 and 171, Customs Regulations (19 CFR Parts 162, 171), to reduce the amount of time property is held in Customs custody, thus reducing the costs of seizure and storage. Specific changes include: (1) reducing the petitioning time in seizure cases from 60 to 30 days; (2) authorizing expedited destruction or other disposition of low-value property under seizure when the costs of storage of the property are disproportionate to its value; (3) changing requirements for publication of administrative forfeiture notices so as to reduce seizure costs; (4) further restricting the granting of extensions of time to file petitions for relief; and (5) increasing the district director's authority to accept payment of the appraised value of seized property from $50,000 to $100,000, inclusive.

These changes were proposed in a notice published in the Federal Register on June 27, 1985 (50 FR 26588). Nine comments were received in response to the notice. A discussion of these comments and our responses follow.

Discussion of Comments

Comment: Several commenters oppose reducing the petition filing time from 60 days to 30 days in both property seizure and forfeiture cases and in non-forfeiture cases. They also object to restricting the allowance of extensions of time to file petitions for relief. They contend that the combination of both reducing the petition filing time and limiting the district director's authority to grant extensions would work substantial administrative injustice and hardship for petitioners.

One commenter states that, in the context of a property seizure case, these changes would result in many administrative or judicial forfeiture proceedings when the matter should properly be resolved by release of the property upon payment of its appraised value

and/or administrative remission or mitigation under § 618, Tariff Act of 1930, as amended (19 U.S.C. 1618). Another commenter believes that these amendments will be interpreted by Customs officers as authority for the wholesale institution of administrative forfeitures or referrals to the U.S. attorney even if a petition is under consideration.

Response: Customs believes that these changes are necessary to allow for the institution of summary forfeiture proceedings in cases involving conveyances either carrying or facilitating the transportation of controlled substances. In such cases, a transporting conveyance would not be released to a petitioner but would instead be summarily forfeited. However, in certain cases, a petitioner could be awarded the proceeds from the sale of a conveyance following its forfeiture.

Comment: One commenter argues that, in a non-seizure case, the events triggering the penalty notice may have occurred two or three years before and consulting stored records and gathering information in light of personnel changes would be difficult to accomplish in 30 days. This commenter suggests that the time to respond be increased to 90 days. Another commenter believes that large corporate importers and exporters will suffer the greatest harm due to the changes because it takes two to three weeks from the time a penalty notice is mailed from Customs for it to be routed to the proper party responsible for handling such matters. This would leave only one or two weeks to draft and submit a responsive petition.

Most commenters feel that the proposed reduction in time to respond to Customs notices would cause substantial difficulties in those cases involving complicated facts, legal issues and/or numerous entries. The commenters indicate that cases of this nature often require substantial research and investigation in order to meaningfully respond to Customs allegations. Consequently, they are opposed to reducing the time to respond in these complex cases, and are generally opposed to limiting the authority of Customs personnel to grant extensions of time to respond. One commenter indicates that he believes a general rule should be promulgated which would permit an automatic extension in the event new counsel is retained by the petitioner during the response period. Another commenter is of the opinion that in cases where less than 180 days remain before the statute of limitations may be asserted as a defense, the minimum response time should be not less than 14 days from the date of receipt of the notice, rather than the current 7-day minimum.

Response: Customs is of the opinion that in the vast majority of cases, 30 days from the mailing date of the violation penalty notice is a reasonable period of time to respond with a petition. Customs does not agree that extensions of time to petition are warranted in every case where new counsel is retained or in cases where inter-

nal corporate structure precludes immediate delivery of the violation notice. Further, it has been legally established in the case of *U.S.* v. *Ross,* 574 F. Supp. 1067 (1983) that a 7-day response period is not unreasonable in cases where the statute of limitations may be asserted as a defense in less than 180 days.

However, Customs recognizes that certain cases may require more time in order to adequately respond to the violation/penalty notice. Consequently, the proposed language of § 171.15, Customs Regulations, has been revised to afford the district director the discretion to grant the alleged violator a 60-day response period (i.e., 60 days from the mailing date of the violation notice) in such cases. In the event the alleged violator disagrees with the district director's determination that the violation notice response period is limited to 30 days, amended § 171.15 provides for a direct appeal to the Director, Entry Procedures and Penalties Division, Customs Headquarters, within 7 days from the mailing date of the violation/penalty notice (a copy of the appeal must be sent to the district director). Section 171.15 states that this appeal does not automatically operate to extend the period specified by the district director, and that the appeal is submitted at the risk of the alleged violator. If the Director, Entry Procedures and Penalties Division, denies the appeal, the alleged violator must submit his petition within the original time period required by the district director. In any seizure case involving or related to controlled substances, however, Customs believes that no extension should be granted absent a demonstration of extraordinary circumstances justifying additional time beyond the required 30 days. Both § 162.32(a) and § 171.12, Customs Regulations, have been amended to cross reference § 171.15 regarding cases where additional time to respond is afforded the alleged violator.

Comment: One commenter states that clerks should not be used to decide legal questions, especially when the decision results in a sizeable penalty. Instead, the commenter suggests that decisions of this nature should be made by attorneys if matters of law are raised.

Response: Although this suggestion is beyond the scope of these regulatory amendments, Customs notes that district personnel are provided extensive training with respect to the issuance of notices of fines, penalties and forfeitures, and that in cases where sizeable penalties are assessed, the mitigation decisions issued by Customs are made by attorneys.

Comment: One commenter disagrees with raising the value of property that must be forfeited by newspaper publication from $250 to $2,500. This commenter believes that $2,500 is too high a figure because Customs is not always aware of all the claimants. Therefore, the amount should be $1,000; the same as the limit for an informal entry.

Response: Customs has determined that raising the limit from $250 to $2,500 will provide great savings in publication costs without jeopardizing claimants' interests in goods subject to forfeiture. Customs believes that the posting of a list of goods subject to forfeiture (valued at under $2,500) at the local customhouse will provide sufficient notice to those interested claimants.

Comment: One commenter suggests that Customs should provide more information in both the prepenalty and penalty processes such as copies of audit reports of investigation, baggage declarations and Customs entries instead of forcing a respondent to make Freedom of Information requests.

Response: This matter, although beyond the scope of these regulatory changes, is presently under consideration and instructions will be sent to Customs field officers in the near future to allow petitioners greater access to information.

Comment: One commenter recommended the following three specific changes in § 162.32: (1) exempting penalties associated with a seizure from the "required collection action" and referring the matters simulaneously if judicial forfeiture is required; (2) replacing the words "mailing date" with "date of the notice"; and (3) omitting the word "is" from the italicized heading to § 162.32(c).

Response: We do not agree with the commenter's second recommendation. Maintaining the mailing date as the date from which the 30-day response period is determined is advantageous to petitioners since it allows them more time in which to prepare a response.

Customs agrees with the commenter's first and third suggestions and will incorporate these changes in § 162.32.

After consideration of all the comments received in response to the notice and further review of the matter, it has been determined to adopt the proposal with the modifications discussed.

Executive Order 12291

This regulation is not a "major rule" as defined by § 1(b) of E.O. 12291. Accordingly, a regulatory impact analysis is not required.

Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) are not applicable to this document because the amendments will not have a significant economic impact on a substantial number of small entities. Accordingly, it is certified that the amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

DRAFTING INFORMATION

The principal author of this document was Susan Terranova, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PARTS 162 AND 171

Administrative practice and procedure, Penalties, Seizures and forfeitures.

AMENDMENTS TO THE REGULATIONS

Parts 162 and 171, Customs Regulations (19 CFR Parts 162 and 171), are amended as set forth below.

PART 162—RECORDKEEPING, INSPECTION, SEARCH, AND SEIZURE

1. The authority citation for part 162 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1624.

§ 162.32 also issued under 19 U.S.C. 1603, 1610.

§ 162.44 also issued under 19 U.S.C. 1614.

§ 162.46 also issued under 19 U.S.C. 1609, 1611.

2. Section 162.32 is revised to read as follows:

§ 162.32 Where petition for relief not filed.

(a) *Fines, penalties and forfeitures.* If any person who is liable for a fine, penalty, or claim for a monetary amount, or who has an interest in property subject to forfeiture, fails to petition for relief as set forth in Part 171 of this chapter, or fails to pay the fine or penalty within 30 days from the mailing date of the violation/penalty notice provided in § 162.31 (unless additional time is authorized for filing a petition, as set forth in Part 171 of this chapter) the district director, shall, after any required collection action is complete, refer any fine or penalty case promptly to the U.S. attorney, or the Department of Justice if the penalty was assessed under §592, Tariff Act of 1930, as amended (19 U.S.C. 1592). In the case of property subject to forfeiture, the district director, where appropriate, shall complete administrative forfeiture proceedings or shall refer the matter promptly to the U.S. attorney, or the Department of Justice if the case arose under § 592, in accordance with the provisions of subparagraph (c) below, unless the Commissioner of Customs expressly authorizes other action.

(b) *Institution of forfeiture proceedings before completion of administrative procedures.* Nothing in these regulations is intended to prevent the institution of forfeiture proceedings before completion of the administrative remission or mitigation procedures pursuant to § 618, Tariff Act of 1930, as amended (19 U.S.C. 1618).

(c) *Seized property not eligible for administrative forfeiture.* If the seized property is not eligible for administrative forfeiture, and neither a petition for relief in accordance with Part 171 of this chapter, nor an offer to pay the domestic value as provided for in § 162.44, is made within 30 days (unless additional time has been authorized under Part 171 of this chapter), the district director shall refer the case promptly to the U.S. attorney for the judicial district in which the seizure was made, or the Department of Justice if the penalty was assessed under § 592.

3. Section 162.44 is amended by revising paragraph (a) and (b)(1)(i) to read as follows:

§ 162.44 Release on payment of appraised value.

(a) *Value exceeding $100,000.* Any offer to pay the appraised domestic value of seized property in order to obtain the immediate release of the property which was seized under the Customs laws or laws administered by Customs and exceeding $100,000 in appraised domestic value, or which was seized under the navigation laws, shall be in writing, addressed to the Commissioner of Customs, and signed by the claimant or his attorney. It shall be submitted in duplicate to the district director for the district in which the property was seized. Proof of ownership shall be submitted with the application if the facts in the case make such action necessary.

(b) *Value not over $100,000—(1) Authority to accept offer.* The district director is authorized to accept a written offer pursuant to § 614, Tariff Act of 1930, as amended (19 U.S.C. 1614), to pay the appraised domestic value of property seized under the Customs laws and to release such property if:

(i) The appraised domestic value of the seized property does not exceed $100,000.

* * * * * * *

4. The heading and paragraphs (b)(1) and (c) of § 162.45 are revised to read as follows:

§ 162.45 Summary forfeiture: Property other than Schedule 1 controlled substances. Notice of seizure and sale.

* * * * * * *

(b) *Publication.* (1) If the appraised value of any property in one seizure from one person other than Schedule 1 controlled substances (as defined in 21 U.S.C. 802(6) and 812) exceeds $2,500, the notice shall be published in a newspaper in the Customs district and the judicial district in which the property was seized for at least three successive weeks. All known parties-in-interest shall be notified of the newspaper and expected dates of publication of such notice.

* * * * * * *

(c) *Delay of publication.* Publication of the notice of seizure and intent to summarily forfeit and dispose of property eligible for such treatment may be delayed for a period not to exceed 30 days in those cases where the district director has reason to believe that a petition for administrative relief in accord with Part 171 of this chapter will be filed.

5. The heading and paragraph (d) of § 162.46 are revised to read as follows:

§ 162.46 Summary forfeiture: Disposition of goods.

* * * * * * *

(d) *Destruction.* (1) If, after summary forfeiture of property is completed, it appears that the net proceeds of sale will not be sufficient to pay the costs of sale, the district director may order destruction of the property. Any vessel or vehicle summarily forfeited for violation of any law respecting the Customs revenue may be destroyed in lieu of the sale thereof when such destruction is authorized by the Commissioner of Customs to protect the revenue.

(2) If the expense of keeping any vessel, vehicle, aircraft, merchandise or baggage is disproportionate to the value thereof, and such value is less than $1,000, destruction or other appropriate disposition of such property may proceed forthwith.

* * * * * * *

6. The heading and first sentence of § 162.48 are revised to read as follows:

§ 162.48 Summary sale of perishable and other property.

Seized property which is perishable or otherwise enumerated in § 612, Tariff Act of 1930, as amended (19 U.S.C. 1612), and is covered by the provisions of § 607, Tariff Act of 1930, as amended (19 U.S.C. 1607), shall be advertised for sale and sold at public auction at the earliest possible date.* * *

7. Paragraph (b) of § 162.78 is revised to read as follows:

§ 162.78 Presentations responding to prepenalty notice.

(a) * * *

(b) *Extensions.* If at least 1 year remains before the statute of limitations may be asserted as a defense, the district director, upon written request, may extend the time for filing a written presentation, or making an oral presentation, or both, for any of the reasons given in Part 171 of this chapter (except for the reason described in § 171.15(a)(4)), relating to extensions of time for filing petitions for relief. In addition, an extension may be granted if, upon the request of the alleged violator, the Commissioner of Customs determines that the case involves an issue which is a proper matter for submission to Customs Headquarters under the internal advice procedures of § 177.11(b)(2) of this chapter. Other extensions may be authorized only by Headquarters.

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Part 171, Customs Regulations (19 CFR Part 171), is amended as set forth below.

PART 171—FINES, PENALTIES AND FORFEITURES

1. The authority citation for Part 171 continues to read as follows:

Authority: 19 U.S.C. 66, 1592, 1618, 1624.

2. Section 171.12 is revised to read as follows:

§ 171.12 Filing of petition.

(a) *Where filed.* A petition for relief shall be filed with the district director for the district in which the property was seized or the fine or penalty imposed.

(b) *When filed.* Unless additional time has been authorized as provided in § 171.15, petitions for relief shall be filed within 30 days from the date of the mailing of the notice of fine, penalty, or forfeiture incurred.

(c) *Number of copies.* The petition shall be filed in triplicate.

(d) *Exception for certain cases.* If a penalty is assessed under § 592, Tariff Act of 1930, as amended (19 U.S.C. 1592), and fewer than 180 days remain from the date of the penalty notice before the statute of limitations may be asserted as a defense, the district director may specify in the notice a reasonable period of time shorter than 30 days but not less than 7 days, for the filing of a petition for relief.

3. Section 171.15 is added to read as follows:

§ 171.15 Extensions of time for filing petition.

(a) *Extension of time for filing petition or supplemental petition for relief.* If there is at least 1 year before the statute of limitations may be asserted as a defense, a district director may extend the time for filing a petition (or establish a 60-day response period pursuant to subparagraph (4) below) or supplemental petition, upon the request of a person who is or may be liable for a fine or penalty, or who has an interest in property subject to forfeiture, in the following situations:

(1) The person is incapacitated and unable to prepare or to assist in the preparation of a petition.

(2) The person is absent from the U.S. for 20 days or more during the specified period for filing the petition for relief.

(3) Evidence necessary to file an effective petition is not immediately available. Evidence is not immediately available if, for example, it:

(i) Is in the possession of a foreign source and must be procured from same.

(ii) Requires that a request of any Government agency be complied with, provided that any such request is not frivolous and is made in accordance with law.

(4) The case involves a complex legal or factual problem. Examples of the type of problem are the need to examine voluminous records (e.g., Customs entries, purchase orders, invoices and the like) to learn the facts on which to base a petition, or the need to determine legal responsibilities in a case involving numerous parties or numerous violations. In such cases, the district director, on his own initiative, may specify in the violation/penalty notice that a 60-day response period from the date of the mailing of the notice is warranted. If, in such cases, the district director concludes that only a 30-day response period is warranted and so indicates in the violation/penalty notice, the person charged with responding shall have 7 days from the date of the mailing of the notice to appeal the decision of the district director to the Director, Entry Procedures and Penalties Division, Customs Headquarters. If an appeal is taken, a copy of the appeal must be furnished to the district director who issued the notice, and the original forwarded to the Director, Entry Procedures and Penalties Division, U.S. Customs Service, 1301 Constitution Ave., NW., Washington, D.C. 20229. Such appeals should clearly set forth the reasons why the particular case warrants an extension beyond the 30-day period. If the appeal is granted, the Director, Entry Procedures and Penalties Division, will notify both the district director and the person charged with responding of the time period allotted for response. In no case will the filing of an appeal under this paragraph toll the 30-day period of time specified by the district director in the violation/penalty notice.

(5) There is an occurrence of some act of God which makes compliance with petitioning time limits impossible.

(6) In any seizure case involved or related to controlled substances, no extensions of time to respond shall be granted absent a demonstration of extraordinary circumstances justifying additional time beyond the 30-day period.

(7) Any other situation in which the district director determines that an extension of time of filing a petition is justified.

(b) *Retention of new counsel insufficient reason to grant extension.* As a general rule, the mere fact that counsel has just been retained, or new counsel appointed or selected, without another enumerated reason, will be insufficient reason to grant an extension of petitioning time.

4. Paragraphs (a) and (c)(2) of § 171.33 are revised to read as follows:

§ 171.33 Supplemental petitions for relief.

(a) *Time and place of filing.* If the petitioner is not satisfied with a decision of the district director or the Commissioner of Customs, a supplemental petition may be filed with the district director. Such a petition shall be filed either:

(1) Within 30 days from the date of notice to the petitioner of the decision from which further relief is requested if no effective period is prescribed in the decision; or

(2) Within the time prescribed in the decision from which further relief is requested as the effective period of the decision.

* * * * * * *

(c) *Second supplemental petition.*

(1) * * *

(2) A second supplemental petition will not be considered except in one of the following circumstances:

(i) If it is filed within 2 years from the date of notice to the petitioner of the decision on the first supplemental petition;

(ii) If it is filed within 30 days following an administrative or judicial decision with respect to the entries involved in the penalty case which reduces the loss of duties upon which the mitigated penalty amount was based; or

(iii) If the deciding official in his discretion determines that the acceptance of a second supplemental petition is warranted.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: November 18, 1985.

DAVID D. QUEEN,
Assistant Secretary of the Treasury.

[Published in the Federal Register, December 10, 1985 (50 FR 50287)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 85-1934)

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, U.S. DEPARTMENT OF AGRICULTURE, APPELLANT *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE

Claud A. Daigle, Jr., of the U.S. Department of Justice, Washington, D.C., argued for appelant. With him on the brief were *Richard K. Willard*, Acting Assistant Attorney General, and *Vito J. DiPietro*. Director.

Wayne W. Herrington, of the U.S. International Trade Commission, argued for appellee. With him on the brief were *Lyn M. Schlitt*, General Counsel, and *Michael P. Mabile*, Assistant General Counsel.

Appealed from: U.S. International Trade Commission.

(Appeal No. 85-1934)

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, U.S. DEPARTMENT OF AGRICULTURE, APPELLANT *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE

(Decided November 29, 1985)

Before MARKEY, *Chief Judge*, DAVIS and BISSELL. *Circuit Judges.*

DAVIS, *Circuit Judge.*

This is an appeal of the United States International Trade Commission's (ITC) decision to terminate its self-initiated investigation entitled *In re Certain Apparatus for Flow Injection Analysis and Components Thereof*, and to vacate the initial determination issued by the ITC's administrative law judge (ALJ) in that investigation. Although this case presents interesting and complex issues, we must hold that the ITC's decision is not an appealable final determination under 19 U.S.C. 1337(c) (1982). Therefore, this controversy is not currently reviewable by this court and ITC's motion to dismiss the appeal must be granted.

I

The ITC's investigation was initiated on its own motion[1] to determine whether the importation and sale in the United States of certain flow injection apparatus and components thereof infringed United States Patent No. 4,013,413 (the '413 patent) and therefore violated § 337 of the Tariff Act of 1930 (19 U.S.C. § 1337). The '413 patent is owned by the USDA. The invention claimed in the '413 patent relates to the automatic continuous chemical flow analysis of liquid samples by operation of a flow injection analyzer, which is similar to a Skeggs analyzer. The Skeggs analyzer includes a device that holds the samples in order so that they are drawn sequentially into the sampling stream, tubing to facilitate the flow of samples to a detector, and posts to insert air and reagent into the flow stream. The flow stream consists alternatively of segments of sample, air, and reagent. The '413 patent provides for a more rapid continuous flow because it removes air bubbles from the analytical flow stream by utilizing two flow streams connected by a transfer valve. This rapid-flow injection analysis concept permits sampling at rates up to 150 samples per hour, while the old Skeggs analyzer was limited to 10–60 samples per hour.

Shortly after the investigation was initiated,[2] the respondents[3] requested reexamination of the '413 patent before the United States Patent and Trademark Office (PTO). The PTO granted the request for reexamination and then suggested that all the original claims of the '413 patent were invalid due to prior art which was not cited during the examination of the original patent application. (This was not, however, the end of the reexamination.)

The respondents' simultaneous motion to stay the § 1337 ITC investigation pending completion of the PTO reexamination had been denied by the ALJ. Accordingly, after an evidentiary hearing, the ALJ filed an initial determination upholding the validity of the '413 patent as applied to the same prior art which was cited by the PTO in the initial reexamination action. The ALJ also concluded that the respondents' devices infringed the '413 patent and their importation injured an industry within the United States in violation of § 1337. Respondents then petitioned the ITC for review of the initial determination, citing the ongoing character of the PTO reexamination. In response, the ITC ordered the investigation suspended pending completion of the reexamination proceeding. Subsequently, during reexamination, the USDA agreed to make certain amendments to all the claims of the '413 patent to overcome the initial PTO rejection and reexamined patent claims were issued.

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[1] Apparently in response to a request by the United States Department of Agriculture (USDA).

[2] The investigation was assigned by the ITC to an ALJ.

[3] Six parties, Bifok AB and five related business entities involved in the development, importation, and marketing of flow injection analysis apparatus manufactured by Bifok, were listed as respondents. The USDA was not named as a party and never became a party to the investigation.

Thereafter, the ITC ultimately vacated the ALJ's initial determination and issued an order terminating the investigation as abated because of the amendment of all the original claims of the '413 patent by the reexamination certificate. The ITC found that (1) amended claims in a reexamination certificate should be treated like new claims and (2) the reexamination statute, 35 U.S.C. § 307(b) makes the intervening rights provision of 35 U.S.C. § 252 (governing the effect of reissue patents) applicable to amended and new claims in reexamination certificates. Furthermore, the ITC noted that the USDA amended the claims to overcome the reexamination examiner's prior art rejection of the original claims and that this implied a substantive change in claim coverage. The present appeal is taken from that decision.

II

The threshold question is whether the ITC's decision to terminate its investigation as "abated" is an appealable "final determination" under 19 U.S.C. § 1337(c).[4]

Appellee ITC contends that (1) a final determination of the ITC under 19 U.S.C. § 1337(c) is a final administrative decision on the merits that excludes or refuses to exclude articles from entry under subsection (d), (e), or (f); and (2) the ITC decision in this case is not a final determination because it is a determination not to decide the case on the merits and therefore is analogous to a dismissal without prejudice.

Appellant seems to recognize that the ITC's order is not intrinsically a final determination because the investigation was dismissed as abated without a finding as to whether 19 U.S.C. § 1337 was violated. Nonetheless, appellant argues that appellate jurisdiction under § 1337 is not limited to ITC orders that are intrinsically final determinations. Rather, appellant submits that it is the substance and not the form of the order that is determinative.[5] Because the ITC order terminated the investigation and is said to have involved the denial of substantive rights, the Secretary of USDA contends that it has the same operative effect as a final determination. Appellant also alleges that the opinion accompanying the order will bind appellant in later proceedings because of the doctrines of res judicata and collateral estoppel.

We hold that the ITC's order is neither intrinsically a final determination nor the equivalent of a final determination. A final determination is "a final administrative decision *on the merits,* excluding or refusing to exclude articles from entry" under 19 U.S.C.

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[4] 19 U.S.C. § 1337(c) states that: "Any person adversely affected by a final determination of the Commission under subsection (d), (e), or (f) of this section may appeal such determination to the United States Court of Appeals for the Federal Circuit for review in accordance with chapter 7 of title 5."

[5] In support of its argument, appellant cites *Import Motors Ltd.* v. *U.S. Int'l Trade Comm'n,* 530 F.2d 940, 945–46, 188 USPQ 490, 495 (CCPA 1976) where the court stated that "an order of the Commission * * * could have the same operative effect, in terms of economic impact upon those terminated, as a final determination * * *. Substance, not form must control."

§ 1337 (d), (e), or (f). *Import Motors Ltd.* v. *U.S. Int'l Trade Comm'n,* 530 F.2d 940, 944, 188 USPQ 490, 494 (CCPA 1976) (emphasis added). With this definition in mind, it logically follows, as the Court of Customs and Patent Appeals ruled in *Refractarious Monterrey, S.A.* v. *Ferro Corp.,* 606 F.2d 966, 971 n.15, 203 USPQ 568, 574 n.15 (CCPA 1979), *cert. denied,* 445 U.S. 943 (1980), that "[a] dismissal in an ITC proceeding without a finding is not a 'final determination'." In this case, the ITC did not rule on the merits but terminated its investigation and wholly vacated the ALJ's initial determination. Thus, this action could not intrinsically be a final determination within the meaning of 19 U.S.C. § 1337(c) because it was not a decision to exclude or refuse to exclude articles from entry under 19 U.S.C. § 1337 (d), (e) or (f).

Appellant does not truly challenge this particular conclusion but contends, rather, that the ITC's order was the equivalent of a final determination. This argument is misplaced. Although the ITC order did terminate this investigation, it was without prejudice. Appellant is free to request a second investigation under 19 U.S.C. § 1337(b)(1) based on the reexamined claims and to proceed through representation by the Department of Justice.[6] In such new proceedings, USDA will be entirely free to make any argument it considers appropriate.[7]

In this connection, we stress that appellant will not be bound in a new investigation by res judicata or collateral estoppel. A determination is conclusive in a subsequent action between the same parties only when the "issue of fact or law is actually litigated *and* determined by a valid and final judgment." Restatement (Second) of Judgments § 27 (1982) (emphasis added). *See also Young Engineers, Inc.* v. *U.S. Int'l Trade Comm'n,* 721 F.2d 1305, 219 USPQ 1142 (Fed. Cir. 1983). One important factor that is considered in determining the finality of a decision for the purposes of preclusion is whether the decision was ever subject to appeal. *Lummus Co.* v. *Commonwealth Oil Refining Co.,* 297 F.2d 80, 89 (2d Cir. 1961), *cert. denied,* 368 U.S. 986 (1962). In *Lummus Co.,* 297 F.2d at 89, Judge Friendly stated that whether a "non-final" judgment "ought nonetheless be considered 'final' in the sense of precluding further litigation of the same issue, turns upon such factors as the nature of the decision (*i.e.,* that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for review." *See also Miller Brewing Co.* v. *Jos. Schlitz Brewing Co.,* 605 F.2d 990, 996 (7th Cir. 1979), *cert. denied,* 444 U.S. 1102 (1980). The Restatement (Second) of Judgments § 13 comment g (1982) also indicates that a decision that is not subject to appeal is not final for the purposes of issue

[6] 19 U.S.C. § 1337 (b)(1) provides that "The Commission shall investigate any alleged violation of this section on complaint under oath * * *."

[7] Both the ITC's motion to dismiss and its brief as appellee state: "The Commission's termination of the present investigation does not preclude the institution of a second investigation based on the reexamined claims, nor can it prejudice the outcome of such an investigation. Indeed, it anticipates the possibility of a second investigation based on the reexamined claims. It is therefore analogous to a dismissal without prejudice."

preclusion. *See also Interconnect Planning Corp.* v. *Feil*, 774 F.2d 1132, 227 USPQ 543 (Fed. Cir. 1985). Since we have held that this court does not have jurisdiction because the ITC did not enter an appealable final judgment, there has been no opportunity for appellate review and appellant will not be bound in any way by the statements in the opinion accompanying the ITC order.[8]

We must conclude that the ITC's decision was neither a final determination nor the equivalent of a final determination. Appellant has no present right to appeal the matters in question to this court. The appellee's motion to dismiss the appeal is therefore granted.

APPEAL DISMISSED

[8] *See* footnote 8, *supra*. As the ITC itself there recognizes, there is no other reason to consider its decision to have been sufficiently "firm and stable" to be granted any preclusive effect. *See* Restatement (Second) of Judgments § 13, *supra*, comments a and g.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

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Morgan Ford
James L. Watson
Gregory W. Carman
Jane A. Restani
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Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 85-117)

UNITED STATES, PLAINTIFF *v.* B.B.S. ELECTRONICS INTERNATIONAL INC., and PEERLESS INSURANCE CO., DEFENDANTS

Court No. 81-12-01643

Before RE, *Chief Judge.*

Memorandum Opinion and Order

[Plaintiff's motion for summary judgment granted in part and denied in part.]

(Decided November 21, 1985)

Richard K. Willard, Acting Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office (*John J. Mahon,* on the brief), for the plaintiff.

Tomas Greenberger, for the defendant B.B.S. Electronics International Inc.

Gottesman, Wolgel, Smith & Secunda, P.C. (*Lawrence L. Flynn*), for the defendant Peerless Insurance Company.

RE, *Chief Judge:* In this action, brought pursuant to 28 U.S.C. § 1582(2)(1982), plaintiff, the United States, seeks to recover $9,481.50 as liquidated damages, jointly and severally, from defendants B.B.S. Electronics International Inc. (BBS), and Peerless Insurance Co. (Peerless), under the terms of an Immediate Delivery and Consumption Entry Bond.

The parties are before the Court on a series of motions and cross-motions. Both defendants move to dismiss plaintiff's complaint for failure to prosecute. In addition, Peerless alleges an affirmative defense that the complaint against it should be dismissed for lack of in personam jurisdiction. Also before the court is plaintiff's cross-motion for summary judgment.

The following questions are presented:

First, whether plaintiff's action should be dismissed because of lack of prosecution; second, whether Peerless waived its jurisdictional objection by asserting in its answer a cross-claim against BBS, or by failing to include the objection in its motion to dismiss; and, finally, whether plaintiff is entitled to summary judgment as a matter of law.

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After careful consideration of the arguments of the parties, the pleadings, and supporting papers, it is the determination of the Court that the action is not subject to dismissal for lack of prosecution. The Court also holds that since Peerless interposed a valid jurisdictional defense which was not waived, plaintiff's action against Peerless is dismissed. Finally, plaintiff's motion for summary judgment against BBS is hereby granted.

FACTS

On June 10, 1975, BBS entered 24 cases of color television sets through the port of New York. The imported merchandise was valued at $9,030.00, and the duty was calculated to be $451.50. On June 11, 1975, BBS, as principal, and Peerless, as surety, duly executed and delivered to the United States an Immediate Delivery and Consumption (Single) Entry Bond. Pursuant to the terms of the bond, the defendants jointly and severally guaranteed that all duties, taxes, and liquidated damages due plaintiff as a result of the entry of the merchandise would be paid. The bond also provided that, if the merchandise was found to be in violation of the laws and regulations governing its admission into the United States, BBS would, after proper notice, export the television sets under the supervision of the Customs Service. If BBS failed to comply with the terms of the bond, it agreed to pay to the district director of customs as liquidated damages, an amount equal to the value of the merchandise, plus the estimated duties, that is, $9,481.50.

On June 23, 1975, the merchandise was conditionally released by the Customs Service to BBS. BBS was directed to keep the shipment intact. On September 9, 1975, BBS was duly notified that the color television sets were in violation of section 360(a) of the Radiation Control for Health and Safety Act of 1968, 42 U.S.C. § 263h, and, therefore, they had to be exported under the supervision of the Customs Service within 90 days. BBS failed to export the television setes in compliance with the notice.

On December 8, 1981, pursuant to section 1582 of title 28 U.S.C., plaintiff, United States, commenced this action seeking to recover $9,481.50 as liquidated damages, plus interest. Plaintiff filed an amended complaint on March 2, 1982. BBS did not respond to the amended pleading.

LACK OF PROSECUTION

On June 13, 1984, BBS moved pursuant to Rule 41(b) of the Rules of this Court to dismiss plaintiff's action for lack of prosecution. By affidavit, Peerless joined in this motion. In its memorandum which accompanied the motion, BBS argued that dismissal was proper because plaintiff had not proceeded "diligently with trying this action on the merits." BBS noted that plaintiff had waited until the last day within the statute of limitations to commence the suit, a full 6 years after the cause of action accrued. BBS also contended that,

for more than 2 years after commencing the action, plaintiff "shelved" the file. In essence, BBS argues that, in all cases, dismissal for failure to prosecute under Rule 41 is mandatory "where no action has been taken for 12 months." This argument is without merit.

Plaintiff's motion is properly addressed to Rule 41(b)(2), which, before its current amendment, read as follows:

> Whenever it appears that an assigned action is not being prosecuted with due diligence, the court may, upon its own initiative after notice, or upon motion of a defendant, order the action dismissed for lack of prosecution.

U.S.C.I.T. R. 41(b)(2).

Dismissal under Rule 41(b)(2) of the Rules of this Court is discretionary. *See Silver Reed America, Inc.* v. *United States*, 5 CIT 279, 280, 565 F. Supp. 1047, 1048 (1983); *cf. Link* v. *Wabash R.R.*, 370 U.S. 626, 629–31 (1961). In general terms, it may be said that the Court will not dismiss an action in the absence of a showing of a clear pattern of delay, contumacious conduct, or failure to comply with orders of the Court. *See e.g., Silver Reed America, Inc., supra*, 5 CIT at 281, 565 F. Supp. at 1049.

In this case, the Court holds that BBS has not persuaded the Court that the extreme sanction of dismissal is warranted. BBS does not allege that plaintiff has failed to comply with any orders of the court or engaged in contumacious conduct. BBS argues simply that plaintiff's case should be dismissed because too much time has elapsed since its initiation. Although plaintiff's laxness in prosecuting this action may not meet with the Court's approval, the Court notes the settlement discussion that have taken place between Peerless and the plaintiff, and that there has been at least one substitution of counsel. Under the circumstances of this case, the motion to dismiss for lack of prosecution is denied.

Lack of Jurisdiction

Plaintiff admits that it failed properly to serve Peerless. As a result of the improper service, in its amended answer, Peerless interposed the defense of lack of in personam jurisdiction, and asserted a cross-claim against BBS in indemnity. Plaintiff argues that, by including the cross-claim in its answer, Peerless effectively waived the jurisdictional defense.

Whether the defense of lack of in personal jurisdiction is waived by a defendant who asserts the defense contemporaneously with a cross-claim is a novel question for this Court. Hence, it is helpful to seek guidance from the other federal courts which have interpreted and applied the Federal Rules of Civil Procedure. The federal courts, however, are divided and have not answered this question uniformly. *Globig* v. *Greene & Gust Co.*, 193 F. Supp. 544, 549 (E.D. Wis. 1961); Recent Development, 59 Colum. L. Rev. 1093, 1094

(1959). *Compare Chase* v. *Pan-Pacific Broadcasting, Inc.*, 750 F.2d 131, 133 (D.C. Cir 1984) (no waiver) *with Merz* v. *Hemmerle*, 90 F.R.D. 566, 569 (E.D.N.Y. 1980) (waiver). After careful examination of the applicable rules and case law, this Court holds that by asserting in its answer a cross-claim against BBS, Peerless did not waive its jurisdictional objection of lack of in personam jurisdiction.

Prior to the enactment of the Federal Rules of Civil Procedure, the rule pertaining to the combining of counterclaims and jurisdictional objections was enunciated by Justice Holmes in *Merchants Heat and Light Co.* v. *J.B. Clow & Sons*, 204 U.S. 286 (1906). In *Merchants Heat*, the defendant claimed that it was improperly served with process. Although the Court "intimate[d] no opinion either way" on the issue of improper service, it held that the defendant submitted to the jurisdiction of the trial court by combining a counterclaim with its objection to service of process. *Id.* at 289. Justice Holmes, writing for the Court, stated:

> [B]y setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action and by invoking submitted to it.

Id.

Since the adoption of the Federal Rules in 1938, virtually all of the courts which have considered this question have cited the language of *Merchants Heat*. *E.g.*, *Neifeld* v. *Steinberg*, 438 F.2d 423, (3d Cir. 1971); *North Branch Products* v. *Fisher*, 284 F.2d 611, 615 n.8 (D.C. Cir. 1960); *see* Note, *Federal Rules of Civil Procedure: Curing an Apparent Waiver of Jurisdictional Defenses*, 32 Md. L. Rev. 156 (1972). Some courts have resolved the issue by distinguishing permissive and compulsory counterclaims, cross-claims, and third-party claims. *E.g.*, *Gates Learjet Corp.* v. *Jensen*, *supra*, 743 F.2d 1325, 1330 n.1 (9th Cir. 1984), *cert. denied*, 53 U.S.L.W. 3777 (U.S. April 29, 1985) (84–1590); *Globig* v. *Greene & Gust Co.*, *supra*, 193 F. Supp. at 548–49; *see also* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1397 (1969 & Supp. 1985). The common question in all of these cases, however, was whether the "procedural rule enunciated in *Merchants Heat and Light Co.* was changed by the Federal Rules of Civil Procedure." *Neifeld* v. *Steinberg*, *supra*, 438 F.2d 427; *see also Lomanco Inc.* v. *Missouri Pacific R.R.*, 566 F. Supp. 846, 849 (E.D. Ark. 1973). It is the determination of this Court that the rule articulated in *Merchants Heat* has been changed by the adoption of the Federal Rules.

Rule 12 of the rules of this Court, which is substantially similar to Federal Rule 12, states, in part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defense may at

> the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) insufficiency of process, (4) insufficiency of service of the summons and complaint, (5) failure to state a claim upon which relief can be granted, (6) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. * * *
>
> * * * * * * *
>
> (h) Waiver or Preservation of Certain Defenses.
>
> (1) A defense of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of the summons and complaint is waived (A) if omitted from a motion in the circumstances described in subdivision (g) of this rule, or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

U.S.C.I.T. R. 12(b), (h).

As stated by Judge Biggs in *Neifeld* v. *Steinberg,* it is clear that "there is nothing in the language of Rule 12(b) which *specifically* shields the defenses of lack of personal jurisdiction * * * from waiver when [the defense is] joined with a counterclaim." *Neifeld* v. *Steinberg, supra,* 438 F.2d at 428 (emphasis in original).

In *Neifeld* v. *Steinberg,* the United States Court of Appeals for the Third Circuit held that Rule 12(b) "implicitly authorizes a defendant to join these defenses with a counterclaim without waiving [the defenses listed in Rule 12]." 438 F.2d at 428. The *Neifeld* court reasoned that if it "were to take the position that a defendant, by raising his jurisdictional defenses in the same pleading in which he asserted a counterclaim, waived his jurisdictional defenses, [it] would in effect be engrafting a judicial exception to Rule 12(b). [It] would be requiring a defendant to raise his jurisdictional defenses by motion when he intends to file a counterclaim in his responsive pleading. This requirement would be contrary to the option provided to the defendant in Rule 12(b)." *Id.* (footnotes omitted).

It is clear that the "trend of decisions, in harmony with * * * sensible pleading rules" is that the "holding that a defendant may not state in an answer both a jurisdictional defense and a counterclaim is inconsistent with the design and purpose of the pleading prescriptions set out in the Federal Rules of Civil Procedure." *Chase* v. *Pan-Pacific Broadcasting, Inc.,* 750 F.2d 131, 132 (D.C. Cir. 1984); *see also Gates Learjet Corp.* v. *Jensen, supra* 743 F.2d at 1330 n.l; *Queen Noor Inc.* v. *McGinn,* 578 F. Supp. 218, 220 (S.D. Tex. 1984); *Lomanco Inc.* v. *Missouri Pacific R.R.,* 566 F. Supp. 846, (E.D. Ark. 1983) (filing of cross-claim is not a waiver). In view of the well-reasoned judicial opinions which have interpreted and applied Federal Rule 12(b), it is the determination of this Court that the asser-

tion of a cross-claim is not a waiver of an otherwise jurisdictional objection.

It is significant to note that the policy considerations implicit in the Customs Courts Act of 1980 also support this conclusion. The Customs Courts Act "expanded and clarified the jurisdiction of this Court to create 'a comprehensive system for judicial review of civil actions arising out of import transactions and federal statutes affecting international trade.' " *United States* v. *Mizrahie,* 9 CIT ——, 606 F. Supp. 703, 706 (1985) (quoting statement of President Carter, 16 Weekly Comp. of Pres. Doc. 2183 (Oct. 11, 1980)). Indeed, section 1583 of Title 28 U.S.C., which grants the Court of International Trade exclusive jurisdiction over any counterclaim, cross-claim, or third-party claim of any party to recover on a bond related to the importaton of merchandise, manifests "the intent of Congress to have the rights of all of the parties adjudicated fully and completely in one action before the Court of International Trade." *Mizrahie, supra,* 9 CIT at ——, 606 F. Supp. at 707. If the Court were to hold that the jurisdictional defense is waived by combining it with a cross-claim, the defendant would be forced either to bring a prior motion, or file a separate action in indemnity rather than a cross-claim. These results would violate the sound policies of speedy resolution of all claims and judicial economy which underlie the Customs Courts Act of 1980 and the Rules of this Court.

Hence, it is the holding of the Court that, by asserting in its answer a cross-claim against BBS, Peerless did not waive its defense of lack of in personam jurisdiction. Furthermore, Peerless did not abandon its jurisdictional defense by opposing plaintiff's motion for summary judgment. Accordingly, plaintiff's motion for summary judgment against Peerless is denied, and the action against Peerless is dismissed.

Summary Judgment

A motion for summary judgment under Rule 56 of the Rules of this Court may be granted only if there is no genuine issue of fact, and the moving party is entitled to judgment as a matter of law. *See C.J. Tower & Sons of Buffalo, Inc.* v. *United States,* 68 Cust. Ct. 17, 22, C.D. 4327, 366 F. Supp. 1395, 1399 (1972), *aff'd,* 61 CCPA 90, C.A.D. 1129, 499 F.2d 1277 (1974). On June 21, 1984, plaintiff filed its opposition to BBS's motion to dismiss, and submitted a cross-motion for summary judgment. Pursuant to Rule 56(i), plaintiff annexed to the motion a statement of material facts. BBS did not controvert this statement. Rather, BBS restated and amplified its arguments pertaining to lack of prosecution. Accordingly, all material facts set out in plaintiff's statement are deemed admitted. U.S.C.I.T. R. 56; *see Suwannee S.S. Co.* v. *United States,* 79 Cust. Ct. 19, 21, C.D. 4708, 435 F. Supp. 389, 390 (1977). Since there is no dispute that there is no genuine issue of material fact, summary judgment is proper.

It is not questioned that summary judgment may properly be granted in an action alleging breach of the terms of a bond. *See, e.g., United States* v. *Atkinson,* 6 CIT 257, 575 F. Supp. 791 (1983). In *Atkinson,* defendant imported three automobiles through the port of Portland, Oregon. In order to secure entry of the merchandise, defendant delivered to the District Director of Customs an Immediate Delivery and Consumption Entry Bond. *Id.* at ——, 575 F. Supp. at 792. Pursuant to the terms of the bond, the importer and its surety agreed to pay liquidated damages to the Customs Service if the importer did not redeliver the merchandise upon proper demand. After Atkinson failed to comply with an order of redelivery, the United States commenced an action on the bond. Subsequently, the court granted summary judgment for plaintiff. The court noted that the bond was breached when the importer failed to redeliver the merchandise. Since the "facts alleged in plaintiff's complaint and admitted by answer establish[ed] the liability of [defendant] for the liquidated damages sought by plaintiff," summary judgment was proper. *Id.* at ——, 575 F. Supp. at 794.

It is undisputed that pursuant to paragraph 7 of the bond, BBS agreed to export the color television sets under Customs supervision. Moreover, BBS agreed that if it failed properly to export them, it would pay to the District Director of Customs, as liquidated damages, an amount equal to the value of the merchandise plus the estimated duties.

On September 9, 1975, BBS was notified that the television sets were in violation of the applicable federal standards, and was instructed to deliver the television sets within 90 days to the District Director of Customs. BBS failed to comply with these instructions. Because of this breach of the entry bond agreement, BBS became liable to plaintiff for the sum of $9,481.50, as liquidated damages. In view of the undisputed facts, the Court holds that BBS is liable on the bond in the sum of $9,481.50, and plaintiff's motion for summary judgment against BBS is granted.

Interest

In its motion, plaintiff requests an award of both pre- and post-judgment interest. The decisions of this Court teach that 28 U.S.C. § 1961, which mandates post-judgment interest, is applicable to the Court of International Trade. *See, e.g., United States* v. *Atkinson,* 6 CIT 257, 575 F. Supp. 791, 795 (1983); *United States* v. *Servitex, Inc.,* 3 CIT 67, 68, 535 F. Supp. 695, 696 (1982). Accordingly, plaintiff's request for an award of post-judgment interest is granted. The calculations of post-judgment interest shall be in accordance with 28 U.S.C. § 1961.

The decisions of this Court also teach that, in the absence of a statutory provision, an award of pre-judgment interest lies within the descretion of the Court, as part of its equitable powers. *Atkinson, supra,* 6 CIT at ——, 575 F. Supp. at 795 (citing *Payne* v.

Panama Canal Co., 607 F.2d, 155, 166 (8th Cir. 1979)). In this action, plaintiff has failed to demonstrate the propriety or necessity of a pre-judgment interest award. Any injury suffered by plaintiff is due, in part, to its laxness in initiating and prosecuting this action. *See Atkinson, supra* 6 CIT at ——, 575 F. Supp. at 796. Hence, in this case, plaintiff's request for pre-judgment interest is denied.

It is the holding of the Court that the defendants' motion to dismiss for lack of prosecuting is denied. Plaintiff's cross-motion for summary judgment against BBS is granted; accordingly plaintiff is granted judgment against BBS in the sum of $9,481.50. The motion of defendant Peerless for discovery is denied, and plaintiff's complaint against Peerless is dismissed. Finally, plaintiff's request for pre-judgment interest is denied, and its request for post-judgment interest is granted.

(Slip Op. 85-118)

AMERICAN GRAPE GROWERS ALLIANCE FOR FAIR TRADE, ET AL., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANTS

Court No. 84-04-00575

Before WATSON, *Judge.*

Memorandum Opinion and Order

[Plaintiffs' motion for enforcement of judgment granted.]

(Decided November 22, 1985)

Heron, Burchette, Ruckert and Rothwell. (Thomas A. Rothwell, Jr. and *James M. Lyons)* for plaintiffs.

Michael P. Mabile, Assistant General Counsel and *Wayne W. Herrington* for defendant U.S. International Trade Commission.

Covington and Burling, (Harvey M. Applebaum, O. Thomas Johnson, Jr. and *David R. Grace)* and *Wiggin and Dana. (Shaun S. Sullivan, Mark R. Kravitz* and *Jack Dunnam)* for defendant-intervenor Banfi Products Corporation.

WATSON, *Judge:* The Court has before it plaintiffs' motion for an order enforcing the judgment in *American Grape Growers Alliance for Fair Trade, et al.* v. *United States,* 9 CIT ——, Slip Op. 85-84 (August 8, 1985) in which the Court held that certain antidumping and countervailing duty proceedings with respect to imported wine had been unlawfully terminated by the International Trade Commission (ITC).

The motion is opposed by the ITC as well as by the defendant-intervenors.

The grounds of objection are that the judgment has been appealed and is the subject of motions to stay the judgment which are pending before the Court of Appeals for the Federal Circuit.

The ITC argues that the motion is inappropriate and granting it would be usurpative of the powers of the appellate court. The defendant-intervenor Banfi Products Corporation goes further and sees a statutory bar to the granting of the motion in the provision of 28 U.S.C. § 2645.

The Court finds no merit in these contentions. If we assume the power of a court to enforce its judgments, than the pendency of an appeal, or the pendency, in conjunction with that appeal, of motions for stay of the judgment, have no bearing. The lower court cannot assume anything about what will happen on appeal, and for the lower court to refrain from acting on any suppositions about future events would be both presumptuous and improper. For this reason, the position of the ITC is rejected.

The argument of the defendant-intervenor is another matter. That argument, on its face, has some plausibility and its rejection has to be explained more fully.

The provision relied on by defendant intervenor reads as follows:

> (c) *A decision of the Court of International Trade is final and conclusive, unless* a retrial or rehearing is granted pursuant to section 2646 of this title or *an appeal is taken to the Court of Appeals for the Federal Circuit* by filing a notice of appeal with the clerk of the Court of International Trade within the time and in the manner prescribed for appeals to United States courts of appeals from the United States district courts. [Emphasis supplied.]

If read literally, this provision would undo some of the most important provisions of the Customs Courts Act of 1980 and undermine one of the basic purposes of that Act, which was to give to this Court all the powers in law and equity of a district court. H. Rep. No. 1235, 96th Cong., 2d Sess. 50 (1980).

If read literally, this provision would nullify the meaningfulness of the grant to this Court, in 28 U.S.C. § 2643(c)(1), of powers of injunction, remand, declaratory judgment, and writs of mandamus and prohibition. A literal reading would obviously eliminate the essential power of a court to deal with matters in which time is of the essence and delay would be unfair, unjust, or injurious.

Fortunately, the absurdity of a literal interpretation is easily avoided by referring to the legislative history of this provision which shows it to be simply a restatement of existing law, intended only to carry forward the law formerly contained in 28 U.S.C. § 2638(b) H. Rep. No. 1235, 96th Cong., 2d Sess. 62 (1980). This takes us back to a time before the enlarged jurisdiction and power of the Court, to a time when its jurisdiction consisted of cases involving questions of classification and valuation of merchandise. The same general language can be followed back to an Act of June 25, 1948, c 646, 62 Stat. 982 (28 U.S.C. § 2637 (1948) in which three sections from the Tariff Act of 1930 (Secs. 501, 515 and 516 or 19 U.S.C. §§ 1501(b), 1515 and 1516(c)) were blended into one.

The original provisions dealt with the extremely limited jurisdiction of the Court in those times, prior to the Trade Agreements Act of 1979 and the Customs Courts Act of 1980. In deciding whether an article was a widget or a gadget, the only consequences of which would be whether an overpayment of duty would eventually be refunded, the enforceability of the lower court's judgment was normally not a pressing matter.

All of this leads the Court to conclude that the provision of 28 U.S.C. § 2645 relates to decisions of a type made under the old law, to those decisions in which there were no elements of possible injury to a party from postponing the effectiveness or enforceability of a judgment. The exact operation of this provision with respect to those judgments need not be decided here. It is clear however, that in cases of the present type, in which time is of the essence, and possible injury is the reason for the law and the reason for its speedy enforceability, judgments of this Court must be enforceable.

It should also be noted that if the provision of 28 U.S.C. § 2645 were read literally, it would also make the rules for obtaining stays in this Court and in the Court of Appeals for the Federal Circuit a superfluous matter. The taking of any appeal would operate as an automatic stay, rendering all rules of the subject of stays unnecessary. See for example, Rule 62 of the Rules of this Court and Rule 8 of the Federal Rules of Appellate Procedure. The fact that these rules have been in effect for a significant period of time without untoward developments is an indication of the meaningfulness of these rules.

This is enough of a catalogue of absurdity in light of the larger purposes of the law to indicate why the Court will not read 28 U.S.C. § 2645 in the manner argued by defendant-intervenor.

In a proper case, such as this one, the enforceability of this Court's judgments should be unquestioned, and a stay is the only way to put off that enforceability. The granting of a stay is within the sound discretion of the Court. *Lineker* v. *Dillon,* 275 F. 460 (N.D. Cal. 1921) (a case of the same approximate vintage as the provision sought to be used here to nullify enforcement). A stay has already been denied by this Court.

A court has inherent power to enforce its judgments and continue proceedings until its judgment is satisfied. *United States ex rel. Riggs* v. *Johnson County,* 6 Wall (73 U.S.) 166, 18 L. Ed. 768; *Wayman* v. *Southard,* 10 Wheat (23 U.S.) 1, 6 L. Ed. 253; *Boers* v. *Haughton,* 9 Pet (34 U.S.) 329, 360, 9 L. Ed. 145, 157.

The reasons given for denying the stay are also the reasons for requiring speedy obedience to the judgment. The necessity of the agencies resuming an investigation which the Court found was unlawfully terminated does not create difficulties or harm of any type comparable to the deprivation of rights of the party aggrieved.

The fact that those who are subject to the enforcement of this judgment are agencies of the government does not diminish the necessity of enforcement. See e.g., *Nader* v. *FCC*, 520 F.2d 1982, 206–207 (D.C. Cir. 1975). If anything, the government should set an example for obedience to judgments of the Court.

The Court concludes by quoting a portion of President Abraham Lincoln's First Message to Congress which is inscribed on the wall outside one of the courtrooms of this Court, and which we obviously take seriously.

> It is as much the duty of government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals.

For the reasons given above it is hereby

Ordered, that plaintiffs' motion to enforce the final judgment of this Court is Granted and it is further

Ordered, that defendant is directed to make determinations pursuant to Sections 703(a) and 733(a) of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1671b(a) and 1673b(a), with regard to ordinary table wine from France and Italy no later than ten days from the date of this order.

(Slip Op. 85–119)

NATIONAL CORN GROWERS ASSOCIATION ET AL., PLAINTIFFS *v.* JAMES A. BAKER III ETC. ET AL., DEFENDANTS

Court No. 85–08–01151

Opinion and Order

[(1) Motions of defendants and intervenor-defendant RAJ to dismiss complaint denied; (2) defendants' motion for certification of interlocutory appeal denied; (3) plaintiffs' motion for rehearing denied; (4) plaintiffs' motion to compel production granted in part and denied in part; defendants' motion for certification of interlocutory appeal therefrom denied; (5) plaintiffs' motions to compel answers granted in part and denied in part; defendants' motion for certification of interlocutory appeal there from denied; (6) defendants' motion for protective order granted; motions of intervenor-defendants RAJ and Certified for protective orders denied; Citicorp motion to intervene granted; Kentucky motion to appear as *amicus curiae* granted.]

(Dated November 26, 1985)

Williams & Connolly (Aubrey M. Daniel, III, Stephen L. Urbanczyk, Manley W. Roberts, Robert W. Hamilton and *William R. Murray, Jr.)* for the plaintiffs.

Richard K. Willard, Acting Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Kenneth N. Wolf*) for the defendants.

McDermott, Will & Emery (R. Sarah Compton and *Kurt J. Olson*) for intervenor-defendant RAJ Chemicals, Inc.

Roger & Wells (*Robert V. McIntyre* and *Roger A. Clark*) for intervenor-defendant Certified Oil Company.

Wilmer, Cutler & Pickering (A. Douglas Melamed, Robert C. Cassidy, Jr. and *Deborah M. Levy)* for proposed intervenor-defendant Citicorp International Trading Company, Inc.

David L. Armstrong, Attorney General (*Frank F. Chuppe,* Assistant Deputy Attorney General) for proposed *amicus curiae* Commonwealth of Kentucky.

AQUILINO, *Judge*: Notwithstanding the court's denial of both plaintiffs' application for a preliminary injunction and defendants' motion to dismiss the complaint in Slip Op. 85–98, as amended, the parties have now returned to this court with renewed requests for the same relief, as well as for other relief.

I

For their part, the defendants (now joined by intervenor-defendant RAJ Chemicals, Inc.) posture that they are immune from this suit, that the court does not have jurisdiction and that the plaintiffs lack standing, to wit:

> * * * Despite the pendency of the Federal defendants' dispositive motion, despite repeated requests by the Federal defendants for this Court of address and determine critical questions such as: (1) standing, (2) sovereign immunity, (3) failure to state a cause of action, (4) lack of jurisdiction and (5) failure to comply with mandatory conditions precedent to this Court's jurisdiction, this Court has not done so. Rather, this Court has order discovery to go forward.[1]

In repeating their demand that the court "adjudicate the dispositive issues" raised by the defendants, counsel also request that any adverse decision thereof be certified for interlocutory appeal pursuant to 28 U.S.C. § 1292.[2]

Were it not for this new, contingent application, this court would not discuss the issues self-evidently considered by Judge Carman at the time of the motions for immediate equitable relief,[3] as well as in his memorandum opinion, and subsequently re-considered by this court in conjunction with the determination to permit the plaintiffs certain discovery, Slip Op. 85–105. Indeed, the memorandum opinion was amended on September 23, 1985 to state unequivocally "defendant's motion to dismiss denied." As to plaintiffs' standing, the opinion reads:

> * * * Plaintiffs here are connected with the domestic production of ethanol. They are threatened with economic injury if ethanol is imported at a rate of duty approximately 58 cents per gallon below the rate set by Congress. Because Congress es-

[1] Federal Defendants' Opposition to Plaintiffs' Motion for Rehearing of Denial of Preliminary Injunction and Renewed Motion for Preliminary Injunction and Federal Defendants' Request for Certification for Interlocutory Review [hereinafter referred to as "Certification Motion"], p. 6.

[2] *Id.* at 7. This request, which is discussed hereinafter in Part II of this opinion, is accompanied by an apparent threat to seek a writ of prohibition and mandamus in the event of denial of certification. *See id.*, n.3. The threat is repeated at pages 16–17 of Federal Defendants' Memorandum in Opposition to Plaintiffs' Motion to Compel and Request in the Alterı ative for Permission to Proceed By Way of Immediate Appeal and Stay [hereinafter referred to as "Defendants' Documents Memorandum"].

[3] *See, e.g.*, minutes of hearing on Sept. 11, 1985, p. 6.

> tablished the tariff under item 901.50, TSUS, to offset tax exemptions available to imported ethanol, thus protecting domestic producers, plaintiffs' threatened injury is arguably within the zone of interest Congress sought to protect by the tariff. *See* 126 Cong. Rec. 31,709.[4]

Taking the allegations of plaintiffs' complaint as true, as the court must for purposes of determination of defendants' motion to dismiss,[5] paragraph 2 thereof shows that the National Corn Growers Association has as its purpose the promotion of American corn, which is a principal source of ethanol. Its membership includes 19 supporting members from related sectors of the corn industry, including fuel ethanol producers.

Plaintiff New Energy Company of Indiana allegedly operates a fuel ethanol facility in South Bend.[6] It is averred that plaintiff Archer Daniels Midland Company operates three ethyl alcohol plants and is the largest producer of fuel ethanol in the United States.[7] According to paragraph 5 of the complaint, plaintiff Ohio Farm Bureau Federation, Inc. has two wholly-owned subsidiary corporations with interests in ethanol-producing facilities, and paragraph 6 claims that plaintiff A.E. Staley Manufacturing Company operates a fuel ethanol plant in Tennessee.

As a group, these named plaintiffs are characterized as "domestic interested parties who have been adversely affected [*sic*] and aggrieved by the entries and the defendants' rulings at issue in this case." [8] Accepting this contention as true for the purpose of determination of defendants' motion, the Administrative Procedure Act, 5 U.S.C. § 702, provides, in part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. * * *

The Supreme Court has characterized actions brought pursuant to this statute as follows:

> The trend of cases arising under the APA and other statutes authorizing judicial review of federal agency action has been toward recognizing that injuries other than economic harm are sufficient to bring a person within the meaning of the statutory language, and toward discarding the notion that an injury that is widely shared is *ipso facto* not an injury sufficient to provide the basis for judicial review.[9]

Here, of course, the plaintiffs are claiming economic harm, and the Supreme Court has stated that

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[4] Slip Op. 85-98, p. 4.
[5] *See, e.g., Jenkins* v. *McKeithen*, 395 U.S. 411, 421-22 (1969).
[6] *See* complaint, para. 3.
[7] *See id.*, para. 4.
[8] *Id.*, para. 7.
[9] *Sierra Club* v. *Morton*, 405 U.S. 727, 738 (1972).

> palpable economic injuries have long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review.[10]

Cf. Association of Data Processing Service Organizations, Inc. v. *Camp,* 397 U.S. 150 (1970); *Barlow* v. *Collins,* 397 U.S. 159 (1970). In *Camp,* the Court held that the plaintiffs had standing to obtain judicial review of a ruling by the Comptroller of the Currency. In *Barlow,* the Court held that tenant farmers eligible for payments under the upland cotton program had standing to challenge an amended regulation of the Secretary of Agriculture. In neither case was the defendant federal official able to show that Congress sought to preclude judicial review of the administrative rulings. *See* 397 U.S. at 157 and 165.

Defendants' memorandum of law refers to a number of recent Supreme Court decisions on the issue of standing, most notably, *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.,* 454 U.S. 464 (1982), *Gladstone, Realtors* v. *Village of Bellwood,* 441 U.S. 91 (1979), and *Warth* v. *Seldin,* 422 U.S. 490 (1975). These decisions, however, do not support the claim of lack of standing herein.

In *Warth,* standing was denied due to the failure of the complaint "clearly to allege facts" demonstrating that the named plaintiffs were the proper persons to invoke judicial resolution of the dispute. 422 U.S. at 518. This is hardly the case here, where the complaint more than adequately meets the Article III requirements of alleging injury. As for the "prudential limitations" [11] on the exercise of federal-court jurisdiction in an action such as this, the Court in *Warth* stated:

> * * * Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. *E.g., United States* v. *SCRAP,* 412 U.S. 669 (1973). But so long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim. 422 U.S. at 501 (citations omitted).

This is precisely the analysis the Court followed in *Gladstone* in concluding that "the facts alleged in the complaints and revealed by initial discovery [we]re sufficient to provide standing under Art.

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[10] *Id.,* 405 U.S. at 733–34, citing *Hardin* v. *Kentucky Utilities Co.,* 390 U.S. 1, 7 (1968); *Chicago* v. *Atchinson, Topeka & Santa Fe Railway Co.,* 357 U.S. 77, 83 (1958); *FCC* v. *Sanders Bros. Radio Station,* 309 U.S. 470, 477 (1940).

[11] 422 U.S. at 498.

III",[12] as well as under Title VIII of the Civil Rights Act enacted by Congress in 1968. *See* 441 U.S. at 100–09.

The *Valley Forge* opinion recites the standing requirement that a "complaint fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question' "[13], quoting from *Camp, supra,* 397 U.S. at 153. In concluding that the plaintiffs in *Valley Forge* lacked standing to pursue their esoteric claim of violation of the Establishment Clause of the First Amendment as a result of transfer of title to some federal land, the Supreme Court stated:

> * * * We simply cannot see that [plaintiffs] have alleged an *injury* of *any* kind, economic or otherwise, sufficient to confer standing. 454 U.S. at 486 (emphasis in original; footnote omitted).

This court cannot, and therefore does not, reach the same conclusion as to plaintiffs' complaint herein.

The memorandum opinion of September 20, 1985 states that "it is clear that this Court should exercise jurisdiction under section 1581(i) when the usual route through administrative action would result in a 'manifestly inadequate' remedy",[14] citing for support *Luggage and Leather Goods Manufactures of America, Inc.* v. *United States,* 7 CIT ——, 588 F Supp. 1413, 1420 (1984), and *United States Cane Sugar Refiners' Association* v. *Block,* 3 CIT 196, 544 F.Supp. 883, *aff'd,* 69 CCPA 172, 683 F.2d 399 (1982). The opinion states further:

> * * * Under the circumstances and the facts of this case, the Court holds it is appropriate to exercise jurisdiction under § 1581(i) for the limited purpose of hearing plaintiffs application for the extraordinary relief of a preliminary injuction.[15]

That application for a preliminary injunction having been denied, the defendants contend in their present papers that the court's jurisdiction, as referred to in the foregoing excerpt, thereby expired.[16] Moreover, they argue that plaintiffs' action is "rendered nugatory after 5:00 p.m., November 1, 1985" [17] as a result of defendants' "declared intention" [18] to comply fully with the law, namely, item 901.50, TSUS [19], after that date.

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[12] 441 U.S. at 115.

[13] 454 U.S. at 475. In their present request for certification, the defendants emphasize the use of the word "arguably" in the memorandum opinion's reference [quoted above, p. 3] to plaintiffs' threatened injury "within the zone of interest Congress sought to protect by the tariff." To the extent that word implied uncertainty in the context of the application for extraordinary equitable relief, no such uncertainty exists now with regard to liberal construction of the complaint. *See, e.g. Conley* v. *Gibson,* 355 U.S. 41 (1957).

[14] Slip Op. 85–98, p.5.

[15] *Id.,* p. 6.

[16] *See* Certification Motion, p. 2.

[17] *Id.*

[18] *Id.*

[19] This item, enacted in 1980 [*see* 94 Stat. 2694], presently provides for an increase until 1993 in the duties on ethyl alcohol imported for fuel use as follows:

Ethyl alcohol (provided for in item 427.88, part 2D, schedule 4) when imported to be used in producing a mixture of gasoline and alcohol or a mixture of a special fuel and alcohol for use as a fuel, or when imported to be used otherwise as fuel	60¢ per gal.

Of course, the defendants have contendedd from the commencement of this action that the court is without jurisdiction under 28 U.S.C. § 1581(i), which provides:

> In addition to the judisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) Revenue from imports or tonnage;
>
> (2) Tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) Embargoes or other quantitative restrictions on the importation of merchandise for reasons other than protection of the public health or safety; or
>
> (4) Administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

Defendants' argument is that the failing of a petition pursuant to 19 U.S.C. § 1516

> is a mandatory condition precedent to obtaining judicial review * * * [P]etitions pursuant to 19 U.S.C. § 1516 are the only reviewable actions, constituting the *only* cause of action under which Congress enabled the domestic industry to seek judicial review of the Secretary's decision concerning the classification of imported merchandise.[20]

In other words, jurisdiction of the Court of International Trade is based only on 28 U.S.C. § 1581(b):

> The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516 of the Tariff Act of 1930.

This position is not well-taken, however. The complaint shows that in 1984 the United States Ambassador to Brazil wrote the defendant Commissioner of Customs, requesting a ruling to circumvent "the very high U.S. tariffs on * * * exports of Brazilian alcohol to the U.S." [21] Customs thereafter issued a letter to the ambassador ruling that various ethanol

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[20] Memorandum in Support of Defendant's Motion to Dismiss [hereinafter referred to as "Defendants' Memorandum"], p. 11

[21] Exhibit B to complaint.

> mixtures * * * would not be subject to the added duties for ethyl alcohol used as a fuel or imported for fuel purposes in item 901.50, TSUS.[22]

The complaint shows that letter rulings to this effect issued to importers.[23]

On July 3 and 19, 1985, the plaintiffs herein petitioned the defendants to revoke those rulings,[24] and on or about August 2, 1985 the Customs Service sent letters to the importers, stating, in part:

> Upon review of this matter we conclude that the 60 cents per gallon duty should be applied to the ethyl alcohol component of this mixture when the mixture is imported for fuel use, inasmuch as the language of item 901.50 encompasses all ethyl alcohol, provided for in item 427.88, which is imported for fuel use, whether it is imported by itself or in a mixture.
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> * * * * * * *
>
> This revocation is made pursuant to section 177.9(d)(1), Customs Regulations, and is effective with respect to all entries made after 5:00 p.m. local time, August 2, 1985. Entries made prior to that time will be governed by the ruling previously issued to you. With respect to any entries made after the effective date of the instant ruling, Customs will consider all facts and evidence submitted by you in connection with claims of reliance on the ruling previously issued you.[25]

However, despite this revocation, Customs thereafter issued letters acquiescing in entries of ethanol mixtures under its prior rulings until 5:00 p.m. on November 1, 1985.[26] This "grandfathering" [27] was apparently based on claims on reliance.[28]

The complaint shows that the plaintiffs objected to these new rulings in August 1985.[29] They then commenced this action, alleging that the Customs Service rulings both before and after the August 2, 1985 revocation were unlawful and praying for a declaratory judgment to this effect and injunctive relief against entry of fuel ethanol after August 2, 1985 without collection of duties prescribed by item 901.50, TSUS.

The defendants admit, as they must, that domestic interested parties such as the plaintiffs may petition the Secretary of the Treasury "*informally* * * * to bring about a change in import classification by procedures other than resort to proceedings under 19 U.S.C. § 1516" [30] citing *Way Distributors, Inc.* v. *United States,* 85

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[22] Exhibit C to complaint.
[23] See complaint, para. 23 and Exhibit D thereto.
[24] See complaint, paras. 26 and 27 and Exhibits E and F thereto.
[25] Exhibit H to complaint.
[26] *See complaint,* paras. 31 and 32 and Exhibits J and K thereto.
[27] Complaint, para. 33.
[28] *See* Exhibit K to complaint.
[29] *See* complaint, paras. 34 and 35 and Exhibits L and M thereto.
[30] Defendant's Memorandum, p. 11 (emphasis in original).

Cust. Ct. 54, C.D. 4870, *aff'd*, 68 CCPA 57, C.A.D. 1265, 653 F.2d 467 (1981). Nevertheless, they argue that that section—1516—provides the sole "legal right" to challenge and unsatisfactory outcome of such informal procedures.

There is no doubt that a petition pursuant to Section 1516 is the primary and traditional means of challenging the classification or rate of duty upon designated imported merchandise, but the foregoing absolutist argument seemingly disregards the precise nature of this action. Here, the defendants have accepted plaintiff's position that item 901.50, TSUS applies, *i.e.*, there is no dispute as to classification or rate of duty within the meaning of Section 1516. Rather, the controversy stems from defendant's determination to deviate from the duty. The plaintiffs seek to counteract this transitory digression, in part through declaratory judgment and mandamus, both federal-court remedies of long standing and independent of remedies prescribed by the Tariff Act of 1930. For example, in *National Milk Producers Federation* v. *Shultz*, 372 F. Supp. 745 (D.D.C. 1974), the district court determined that it had jurisdiction under 28 U.S.C. § 1361 to force the Secretary of the Treasury to comply with the requirements of 19 U.S.C. § 1303. Of course, this grant of mandamus jurisdiction, as well as that of declaratory-judgment jurisdiction, are now vested in this Court of International Trade as a result of enactment of the Customs Courts Act of 1980. In its report on this statute, the Committee on the Judiciary of the House of Representatives stated:

> Subsection (c)(1) [of 28 U.S.C. § 2634] is a general grant of authority for the Court of International Trade to order any form of relief that it deems appropriate under the circumstances. It is the Committee's intent that this authorization be deemed to grant the Court of International Trade remedial powers co-extensive with those of a federal district court. This provision makes it clear that the court may issue declaratory judgments, writs of prohibition and mandamus, orders of remand, and preliminary or permanent injunctive relief * * *.[31]

A review of subsections (a) through (h) of 28 U.S.C. § 1581 leads to the conclusion that jurisdiction for this court's power to grant declaratory or mandamus relief in a manner co-extensive with that of a district court in an action such as this must be based on subsection (i).[32] The defendants admit that this subsection is a "residual jurisdictional grant, in addition to the jurisdiction provided in 28 U.S.C. § 1581(a)–(h)",[33] citing *United States* v. *Uniroyal, Inc.*, 69 CCPA 197, 687 F.2d 467 (1982).

In that case, the government apparently raised the same jurisdictional argument raised herein, albeit necessarily based on subsec-

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[31] H.R. Rep. No. 1235, 96th Cong., 2d Sess. 61 (1980).

[32] Pursuant to 28 U.S.C. S.2643(c)(4), the court may order appropriate declaratory relief in an action invoking jurisdiction under subsection (h), but 28 U.S.C. S.2631(h) provides that such an action may be commenced by a person with standing to bring suit under subsection (a), as opposed to (b), of Section 1581.

[33] Defendants' Memorandum, p. 9.

tion (a), as opposed to (b), of Section 1581. The CCPA agreed with the argument that subsection (i) was not the appropriate jurisdictional predicate for the plaintiff importer's concern over the impact of a ruling as to both past and future marking of footwear. Judge Baldwin's opinion for the majority states that Congress did not intend that subsection (i) be "used *generally* to bypass administrative review by *meaningful protest*".[34] In her concurring opinion, Judge Nies stated:

> * * * Section 1581(i) provides jurisdiction "*in addition to* the jurisdiction conferred * * * by § 1581(a)–(h)" (emphasis added) and may not be construed as an all embracing alternative remedy to those sections. In my view the broad subject matter jurisdiction of the court under § 1581(i) may be invoked only when no other remedy is available or the remedies provided under other provisions of [28] USC 1581 are manifestly inadequate. 69 CCPA at 187, 687 F.2d at 475 (footnote omitted).

When pursuit of a protest under 19 U.S.C. § 1516 is manifestly inadequate, which was the court's conclusion herein on September 20, 1985,[35] subject matter jurisdiction of this Court of International Trade is properly predicated on 28 U.S.C. § 1581(i). *E.g., Luggage and Leather Goods Manufacturers of America, Inc.* v. *United States, supra. See also Cane Sugar Refiners Association* v. *Block, supra; Vivitar Corp.* v. *United States,* 7 CIT ——, 585 F. Supp. 1419 (1984), *aff'd,* 761 F.2d 1552 (Fed. Cir. 1985).

Indeed, pursuit of a protest would appear no more meaningful now than it did in September, notwithstanding the fact that defendant's self-imposed grace period had expired and also that on September 18, 1985 the International Trade Administration ("ITA") reached a preliminary determination that "fuel ethanol from Brazil is being, or is likely to be, sold in the United States at less than fair value, as provided in section 733 of the Tariff Act of 1930",[36] thereby causing suspension of liquidation of all entries of fuel ethanol from Brazil on or after September 25th.[37] This determination, of course, does not suspend liquidation of entries for the period August 2 to September 25th.[38]

Intervenor-defendant RAJ Chemicals admits that this is a "highly unusual action",[39] but, with the passing of the November 1, 1985 deadline, it now argues in a supplemental motion to dismiss that the action is moot. The motion states that five shipments of

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[34] 69 CCPA at 184, 687 F.2d at 472 (emphasis added, footnote omitted).

[35] *See supra,* p. 7.

[36] 50 Fed. Reg. 38,872 (1985). Final determination is predicted by December 2, 1985. *See id.*

[37] *See* 50 Fed. Reg. 38,874 (1985). On April 11, 1985, the International Trade Commission had found that there is a reasonable indication that imports of fuel ethanol from Brazil are threatening material injury to a United States industry. *See* USITC Pub. No. 1678 (April 1985).

[38] The inadequacy of the protest procedure under 19 U.S.C. S.1516 to address this unique problem, allegedly the result of an unlawful act, is further manifested by subsection (d) thereof, which makes relief thereunder prospective only. *Cf. Flintkote Co., Glens Falls Division* v. *Blumenthal,* 596 F.2d 51, 55 (2d Cir. 1979).

[39] Intervenor-Defendant RAJ Chemicals Inc.'s Supplemental Motion to Dismiss, p. 16, n. 6 (Nov. 7, 1985).

fuel ethanol totalling 44 million gallons were landed in the United States before November 1st.[40]

Apparently as a result of discovery, the plaintiffs depict the shipments as follows:

Importer	Quantity of ethanol blend (million gallons)	Approximate date of entry	Port of entry	Vessel
Citicorp	8	9/5/85 and 9/6/85.	Wilmington, NC and Savannah, GA.	Stolt Luisa Pando.
Citicorp	10	Late October 1985.	Savannah, GA. and/or Wilmington, NC.	Avanti.
RAJ	6.03	9/4/85	Redwood City, CA.	Stolt Venture.
Southern Missouri.	8.82	10/29/85 to 10/30/85.	Baton Rouge, LA.	Product Splendor.
Southern Missouri.	10.08	10/29/85 to 10/30/85.	West Wego, LA	Chios[41]

They deny that their action is moot, arguing that past entries pose a

> continuing threat of future injury, because those entries are being and will be marketed after November 1. Such marketing will compete with domestic ethanol, driving down prices, displacing domestic product, and consequently reducing demand for American corn.[42]

Moreover:

> * * * [G]iven the Service's position, there is a reasonable possibility that defendants will issue similar rulings in the future and again assert the authority to grant importers a duty-free grandfather period * * *. If the grandfathering period is sufficiently short, as it is here, others (including

[40] *See id.*, p. 3. Exhibits A and B to the supplemental motion account for two shipments aggregating 18.90 million gallons having been imported from Brazil during the weekend on October 26–27, 1985 by Southern Missouri Oil Company and having been "immediately sold and transferred to CITGO Petroleum Corporation." Exhibit B, p. 4, para. 13. Southern Missouri apparently received "authorization letters" from the Customs Service on or about October 11, 1985 to land both shipments at a rate of duty of 7% *ad valorem*. *See id.*, paras. 10–12. CITGO apparently redistributed 29,000 barrels and 10,000 barrels from these shipments to RAJ Chemicals. *See* Exhibit A, pp. 3–4, para 9.

[41] Supplemental Memorandum in Support of Plaintiffs' Motion for Rehearing of Denial of Preliminary injunction and Renewed Motion for Preliminary Injunction, and Reply to Federal Defendants' and RAJ Chemical Inc.'s Oppositions. [hereinafter referred to as "Plaintiffs' Supplemental Memorandum"], Exhibit 1 (Nov. 8, 1985).

[42] *Id.*, p. 48 (footnote omitted).

> plaintiffs) may again suffer injury from duty-free imports without having sufficient time to obtain a judgment before the period ends.[43]

The plaintiffs contend that the rulings complained of are capable of repetition, yet evading review and therefore this action is not moot, citing *Southern Pacific Terminal Company* v. *ICC,* 219 U.S. 498 (1911), and *Gallagher & Ascher Co.* v. *Simon,* 687 F.2d 1067 (7th Cir. 1982).

This court agrees that this action is not moot. In *Weinstein* v. *Bradford,* 423 U.S. 147 (1975), the Supreme Court recognized the continuing vitality of the "capable of repetition, yet evading review" doctrine, albeit

> limited to the situation where two elements combined: (1) the callenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.[44]

The first element has already proven true, and the court is unable to conclude that the complaining parties will not be subjected to the same action again. *Cf. County of Los Angeles* v. *Davis,* 440 U.S. 625 (1979). In fact, when this court suggested during a conference with counsel that liquidation be suspended pending expedited discovery and trial of the issues raised herein, the defendants rejected the suggestion, renewing their demand for reconsideration of their threshold legal arguments. That is, the defendants consider themselves free to liquidate the above entries on their own terms—terms which the complaint has alleged from the beginning will cause the plaintiffs irreparable harm.[45]

The court cannot decide the merits of these conflicting positions without a trial, which it has jurisdiction to conduct pursuant to 28 U.S.C. § 1581(i)(4). The defendants content, however, that they are immune from this suit, relying on *Louisiana* v. *McAdoo,* 234 U.S. 627 (1914). In that case, the Supreme Court held that the defense of sovereign immunity barred the State of Louisiana, as a producer and seller of sugar, from challenging the Secretary of the Treasury's determination of the appropriate tariff rate for Cuban sugar.

McAdoo, however, is substantially different from this action. There, the Secretary of the Treasury had to determine whether the provisions of the Tariff Act of 1913 had superseded the tariff provisions contained in a 1902 commercial treaty between the United States and Cuba that was enacted into law by Congress in 1903. The Court held that the process of deciding the applicable duty involved the exercise of discretion by the Secretary in determining the applicable duty. Here, the Secretary does not dispute the duty

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[43] *Id.,* p. 49, n.33.
[44] 423 U.S. at 149; *Murphy* v. *Hunt,* 455 U.S. 478, 482 (1982).
[45] *See generally* complaint, paras. 37–45.

for imported fuel ethanol, which is clearly stated in the Tariff Schedules of the United States and which Congress clearly intends be imposed. Since there is no question as to the applicable duty, its imposition appears to be a ministerial, rather than a discretionary, matter.

In *Eastern Kentucky Welfare Rights Organization* v. *Simon*, 506 F.2d 1278 (D.C. Cir. 1974), *vacated and remanded on other grounds*, 426 U.S. 26 (1975), the Court of Appeals commented:

> *McAdoo*, however, must be viewed in its proper perspective. The Court decided that case in 1914. Since then, significant changes have occurred in the area of standing, and exceptions to the doctrine of sovereign immunity have been judicially recognized. . . . Moreover, with the advent of the Administrative Procedure Act in 1946, the continued viability of sovereign immunity with respect to administrative actions has been seriously questioned.[46]

The Administrative Procedure Act, 5 U.S.C. § 702, provides, in pertinent part:

> * * * An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer of employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injuctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance * * *.

The standard for application of this statute, as enunciated by the Supreme Court in decisions such as *Association of Data Processing Service Organizations, Inc.* v. *Camp* and *Barlow* v. *Collins*, *supra*, is whether it is clear that Congress sought to preclude judicial review of the government action in question. Applying this standard, it is anything but clear from a reading of the Customs Courts Act of 1980 and its legislative history that Congress intended to shield official acts of the kind under challenge herein from review by this court.

Since, as this court has concluded, that legislation has provided subject-matter jurisdiction for aggrieved domestic interested parties to obtain judicial review and those parties have standing to proceed, defendants' motion to dismiss the complaint must be denied,[47]

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[46] 506 F.2d at 1282–83 (citations omitted). The Supreme Court expressed no opinion as to the continued vitality of *McAdoo*. *See* 426 U.S. at 36, n. 14.

[47] The defendants pay nothing more than the lip service quoted above, page 2, to the point that plaintiffs' carefully-crafted complaint fails on its face to state a claim upon which relief could be granted. The motion to dismiss of intervenor-defendant RAJ Chemicals does not add to the discussion on this point.

since they are not immune from the suit. *Compare* 5 U.S.C. § 702, *supra, with Califano* v. *Sanders,* 430 U.S. 99, 107 (1977), *and Alberta Gas Chemicals, Inc.,* v. *Blumenthal,* 82 Cust. Ct. 77, 88, C.D. 4792, 467 F. Supp. 1245, 1253 (1979).

II

The court's foregoing reconsideration and necessary denial of defendant's motion to dismiss the complaint calls into account defendants' contingent request for inclusion in the order of denial of a statement pursuant to 28 U.S.C. § 1292(d)(1), which provides:

> * * * [W]hen any judge of the Court of International Trade, in issuing any * * * interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such other.

This is an extraordinary form of relief, which is usually granted only in complex cases. *See, e.g., Baxter Travenol Laboratories* v. *LeMay,* 514 F. Supp. 1156, 1159 (S.D. Ohio 1981), *appeal dismissed,* 708 F.2d 721 (6th Cir. 1982). The defendants seemingly misunderstand its purpose. As the Third Circuit has pointed out with regard to the companion provision for appeals from interlocutory district-court orders:

> It is quite apparent from the legislative history * * * that Congress intended that § 1292(b) should be sparingly applied. It is to be used only in exceptional cases where an intermediate appeal may avoid protracted and expensive litigation and is not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation.[48]

Denial of a motion to dismiss a complaint is not sufficient, in itself, to warrant certification of an interlocutory appeal. *See, e.g., C.L. Hutchins & Company* v. *United States,* 67 Cust. Ct. 354, C.D. 4297, 334 F. Supp. 188 (1971); *A.N. Deringer, Inc.* v. *United States,* 70 Cust. Ct. 337, C.R.D. 73-4 (1973). *See also Kurt S. Adler, Inc.* v. *United States,* 71 Cust. Ct. 284, C.R.D. 73-31 (1973) (grant of motion for more definite statement not sufficient ground for interlocutory appeal). Here, defendants' papers do not convince this court that the motion to dismiss raises issues of such potential for disagreement that an immediate appeal is warranted.

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[48] *Milbert* v. *Bison Laboratories,* 260 F.2d 431, 433 (3d Cir. 1958). *See also Kraus* v. *Board of County Road Commissioners,* 364 F.2d 919, 922 (6th Cir. 1966); *Cardwell* v. *Chesapeake & Ohio Railway Co.,* 504 F.2d 444, 446 (6th Cir. 1974).

But even if they did make such a showing, the defendants fail to show how such an appeal would materially advance termination of the litigation in view of the discovery already conducted, combined with a request for trial in early December 1985 [49] and the transitory nature of the Customs rulings complained of. Furthermore, the issues raised do not portend a protracted trial.

In short, the court is not persuaded that the interests of orderly procedure would best be served by certifying for appellate review the points made by the motions to dismiss the complaint, and defendants' motion pursuant to 28 U.S.C. 1292(d)(1) for certification of such an appeal therefore must be denied.

III

As indicated above, the plaintiffs have served and filed a Motion for Rehearing of Denial of Preliminary Injunction and Renewed Motion for Preliminary Injunction purportedly pursuant to Rules 59 and 65 of the Rules of the Court of International Trade. Having made this motion within 30 days of the court's denial on September 16, 1985 of plaintiffs' original application and issuance of the memorandum opinion on September 20th,[50] the plaintiffs served and filed on November 8th their Supplemental Memorandum [51] and also delivered to the court three bulky bound volumes of appendices thereto.[52]

The defendants and intervenor-defendant RAJ Chemicals vigorously oppose plaintiffs' motion(s) on both procedural and substantive grounds. Their opposition is well-founded.

On its face, Rule 59 provides for rehearings in actions which have been tried and gone to judgment, which is not the case here. Nevertheless, it has been held that the "concept of a new trial under Rule 59 is broad enough to include a rehearing of any matter decided by the court without a jury". *Timken Company* v. *United States*, 6 CIT ——, 569 F.Supp. 65, 67 (1983), quoting 11 C. Wright & A. Miller, Federal Practice & Procedure § 2804 at 35

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[49] *See* Plaintiffs' Supplemental Memorandum, p. 51.

[50] Rule 59(b) requires that motions for rehearing be served and filed within 30 days.

[51] The defendants object to the court's consideration of this memorandum on the ground of Rule 7(d), which has been interpreted as follows:

> Rule 7(d) of the Rules of this Court does not allow the moving party to file a reply brief if its motion was non-dispositive * * *. The filing of such a reply must be approved by the Court, which approval must be obtained even if the opposing parties have no objection.

United States Steel Corp. v. *United States*, 3 CIT 170 (1982). The court would sustain the objection were it not for the fact that the memorandum essentially presents and discusses the fruits of plaintiffs' discovery (bound in the three volumes), thereby making it germane to their motion to compel additional answers on deposition served and filed on October 28, 1985 and responded to by the defendants on November 12, 1985. *See* Part V, *infra*.

The court also notes in passing the filing on November 7th of a "Supplemental Motion to Dismiss" on behalf of intervenor-defendant RAJ Chemicals, the acceptance of which is urged by the defendants despite the skirting of proper practice.

[52] For reasons best known to plaintiffs' counsel, copies of these volumes were not timely served on the opposing attorneys. The fact that those attorneys may now possess either the volumes or their contents [*see, e.g.*, Federal Defendants' Memorandum in Opposition to Plaintiffs' Motion to Compel Answers to Certain Questions Posed of Mr. Roth and Mr. Fox at Depositions and Request in the Alternative for Permission to Proceed By Way of Immediate Appeal and Stay (hereinafter referred to as "Defendants' Depositions Memorandum"), p. 2 (Nov. 12, 1985)] is no excuse for not providing opponents simultaneously with papers in the format presented to a court.

Defendants' counsel also complain of the failure to file the appendices with the Clerk. However, in view of the nature of their contents, filing must abide an order of the court pursuant to Rule 5(d).

(1973). It is claimed in *Gainey* v. *Brotherhood of Railway & Steamship Clerks*, 303 F.2d 716, 718 (3d Cir. 1962), that courts "have experienced no difficulty in concluding that a motion for rehearing or reconsideration made * * * after the entry of an appealable order is within the coverage of Rule 59".[53] And the court in *Ionian Shipping Company* v. *Tyson Shipping Co.*, 49 F.R.D. 334, 336 (S.D.N.Y. 1969), found it "clear that the concept of a 'new trial' used in Rule 59 has been interpreted to encompass the rehearing of a motion."

Be those opinions as they may, determination of a motion for rehearing lies within the sound discretion of the court. *E.g., Commonwealth Oil Refining Company* v. *United States*, 60 CCPA 162, 166, C.A.D. 1105, 480 F.2d 1352, 1355 (1973). Of course, rehearing can rectify "a significant flaw in the conduct of the original proceeding". *E.g., North American Foreign Trading Corp.* v. *United States*, 9 CIT ——, Slip Op. 85–24 (March 1, 1985). That is:

> A rehearing may be proper when there has been some error or irregularity in the trial, a serious evidentiary flaw, a discovery of important new evidence which was not available, even to the diligent party, at the time of trial, or an occurrence at trial in the nature of an accident or unpredictable surprise or unavoidable mistake which severely impaired a party's ability to adequately present its case.[54]

In other words, rehearing is a means to correct a miscarriage of justice.

However, careful review and consideration of plaintiffs' motion papers do not convince this court of the existence either of a significant flaw in the conduct of the original proceeding in September or of compelling new evidence or of a miscarriage of justice, nor is this court persuaded that plaintiffs' new application entitles them now to a preliminary injunction.

Plaintiffs' argument is essentially threefold, to wit, (1) the court failed to give adequate weight to factors other than the weight of irreparable harm, (2) the court failed to apply the correct legal standard of threat of irreparable harm and (3) newly-discovered evidence further supports plaintiffs' claims of irreparable harm and probability of success on the merits.

The argument seems oblivious, however, to the rule that "injunctive relief is to be granted only in extraordinary circumstances".[55] No amount of words, however well-chosen, can create such circumstances. Furthermore, while the court in September considered and weighed each of the four factors to be evaluated in determining an

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[53] The court's order denying plaintiffs' application for a preliminary injunction was, of course, appealable pursuant to 28 U.S.C. S.1292(c)(1).

[54] 54 *W.J. Byrnes & Co., Inc.* v. *United States*, 68 Cust. Ct. 358, C.R.D. 72–5 (1972); *Oak Laminates* v. *United States*, 8 CIT ——, Slip Op. 84–129 at 6 (Dec. 6, 1984).

[55] *Zenith Radio Corporation* v. *United States*, 710 F.2d 806, 809 (Fed. Cir. 1983). The plaintiffs do not rely on the holding of this case that the "consequences of liquidation * * * constitute irreparable injury" [719 F.2d at 810], presumably because the case involved immediate liquidation during the period of an annual review of an antidumping order pursuant to 19 U.S.C. S. 1675, which is not the situation here.

application for a preliminary injunction,[56] the plaintiffs seem to disregard the fact that failure of an applicant to sustain its burden of proof on any one of those factors is ground for denial. *See, e.g., American Air Parcel Forwarding Company* v. *United States*, 6 CIT 146, 573 F. Supp. 117, 122, *aff'd*, 718 F.2d 1546 (Fed. Cir. 1983), *cert. denied*, 104 S.Ct. 1909 (1984).

Understandably, plaintiff's papers concentrate on attempting to convince this court that whatever harm they will suffer is of such a nature as to warrant an immediate injunction. But that harm necessary to withstand a motion to dismiss is not sufficient for such extraordinary interim relief unless, as the Supreme Court and other courts have emphasized, it is "*irreparable*":

> * * * Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm. [57]

The court was not convinced in September that the threat of harm claimed was irreparable, and the application now is even less convincing. If the only ethanol shipments at issue are the five recited above at page 16, liquidation of duties on the three October entries is now suspended as a result of the ITA preliminary determination. In fact, plaintiffs' proposed form of injunction only seeks to "suspend or otherwise delay liquidation" of the two September entries.[58] The defendants have at least one year from the date of entry to liquidate,[59] during which the plaintiffs "fully anticipate that a trial and decision on the merits of this case will be completed".[60] Indeed, in again denying the plaintiffs a preliminary injunction, this court hereby grants their request for a trial in early December. And the trial (and resultant disposition) will include the importers of the two ethanol entries presently open to liquidation.

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[56] *See* Slip Op. 85-98 *passim*.

[57] *Sampson* v. *Murray*, 415 U.S. 61, 90 (1973), quoting from *Virginia Petroleum Jobbers Association* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (emphasis in original).

[58] Intervenor-defendant RAJ Chemicals contends that the 6.03 million-gallon shipment was landed at Redwood City, California and sold immediately upon entry for retail sale in the California market. *See* Intervenor-Defendant's Memorandum in Opposition to Plaintiff's Motion for Rehearing of Denial of Preliminary Injunction, pp. 5-6 and appended affidavit of Maulik H. Radia.

The Motion of Citicorp International Trading Company, Inc. for Leave to Intervene shows the 8 million-gallon shipment has been contracted for sale in the southeastern United States.

Plaintiffs' present application fails to show specifically how either one of these September shipments is causing or will cause irreparable injury. At the hearing on September 13, 1985, plaintiff A.E. Staley Manufacturing Company's Vice President testified that the company had already been displaced from the ethanol market in the southeastern United States.

[59] *See* 19 U.S.C. S. 1504 and 19 C.F.R. S. 159.11.

[60] Plaintiffs' Motion for Rehearing of Denial of Preliminary Injunction and Renewed Motion for Preliminary Injunction, p. 9, n. 6. Other than defendants' rejection of the court's suggestion that liquidation be suspended voluntarily pending trial [*see supra*, p. 18], there is no indication that the defendants intend to proceed with liquidation at this time.

IV

The plaintiffs served the defendants with various requests for discovery, namely, a demand for documents, depositions and interrogatories. In Slip Op. 85–105, this court denied defendants' motion for a protective order and granted plaintiffs' motion, in part, for expedited discovery.

Defendants' counsel have apparently complied with the court's order, for the most part. However, certain documents (or parts thereof) have been withheld, and witnesses at depositions have been directed not to answer certain questions, on the grounds of privilege, which are now challenged by the plaintiffs in motions to compel production of the remaining relevant documents [61] and answers to the deposition questions.

As to the disputed documents, defendants' response has been to withdraw their claim of privilege as to No. 12, thereby providing the plaintiffs with a copy, while delivering to the court under seal for *in camera* inspection the remainder (numbered 13, 19, 53, 54, 60, 70, 90, 111, 116 and 117 [62]). Of this group, redacted versions of all but Nos. 13 and 90 apparently have already been turned over to plaintiffs' counsel.

The defendants assert executive privilege [63] as to each of the documents except for No. 90, citing for support *Zenith Radio Corporation* v. *United States*, 764 F.2d 1577 (Fed. Cir. 1985), *National Latex Products Company* v. *United States*, 3 CIT 49 (1982), and *Sprague Electric Company* v. *United States*, 81 Cust. Ct. 168, C.R.D. 78–18, 462 F.Supp. 966 (1978), among other cases. While asserting this privilege, the defendants do note that "factual material is not the subject of a claim of governmental privilege.[64]

Of the documents for which this claim is asserted, only No. 60, which is described by the defendant Commissioner as a "memorandum dated August 1, 1985, from Assistant Secretary (Enforcement and Operations) for Secretary Baker, through Deputy Secretary Darman",[65] appears to the court after *in camera* review and comparison with the Commissioner's affidavit to have been prepared before the date of the contested revocation ruling.[66] The Supreme

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[61] The plaintiffs requested documents identified at the depositions. The defendants have requested until November 25, 1985 in which to respond.

[62] Additionally, Nos. 13, 19, 70 and 111 are claimed to contain business confidential information not subject to public disclosure pursuant to agreement among the parties as to use of such information. *See* note 71 and Part VI, *infra*.

[63] This privilege is asserted by the defendant Commissioner of Customs in an affidavit sworn to November 1, 1985. Upon a review of this affidavit, which states, among other things, that the affiant personality reviewed the documents and that none had been circulated or disclosed to persons outside the government, the court finds the claim of executive privilege to be properly invoked. *See, e.g.*, , *United States* v. *Reynolds*, 345 U.S. 1, 7–8 (1953).

[64] Defendants' Documents Memorandum, p. 7, n. 5.

[65] Affidavit of William Von Raab, para. 4(e) (Nov. 1, 1985).

[66] Document 13 is an undated draft, but it commences by referring to August 2, 1985 as past; No. 19 bears the date "8/13/85"; No. 53 has "Aug. 2, 1985" stamped on it [No. 54 is a carbon (unstamped) copy thereof]; No. 70 is dated "8/8/85"; No. 111 is characterized as "[n]otes taken by John Roth, Deputy Director, Classification and Value Division, of a conversation with Mr. Stapp on August 19, 1985" [*id.*, para. 4(g)]; the cover, transmittal memo of No. 116 is dated September 13, 1985; and No. 117, while undated, refers to the challenged "grandfather provision".

Court has discussed the significance of the date of decision for a claim of executive privilege as follows:

> Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions. The quality of a particular agency decision will clearly be affected by the communications received by the decisionmaker on the subject of the decision prior to the time the decision is made. However, it is difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the decision is finally reached; and therefore equally difficult to see how the quality of the decision will be affected by forced disclosure of such communications, as long as prior communications and the ingredients of the decisionmaking process are not disclosed. Accordingly, the lower courts have uniformly drawn a distinction between predecisional communications, which are priviledged, * * * and communications made after the decision and designed to explain it, which are not. * * * This distinction is supported not only by the lesser injury to the decisionmaking process flowing from disclosure of postdecisional communications, but also, in the case of those communications which explain the decision, by the increased public interest in knowing the basis for agency policy already adopted.[67]

Applying this distinction to the documents at hand, the court finds that only No. 60—both in view of its timing as well as its indicated author and recipient(s) and contents (except for the last page, which apparently has been disclosed to plaintiffs' counsel)—is protected from disclosure on the ground of executive privilege. None of the other contested documents, or the redacted portions thereof, qualify for such exemption. That is, they fit the category of "communications made after the decision and designed to explain it, which are not" privileged referred to by the Supreme Court in the foregoing excerpt from its *NLRB* decision.

The defendants argue that document 13, which is comprised of 17 pages and described by the defendant Commissioner as a "draft memorandum prepared by Alfonso Robles, from the Commissioner of Customs to the Secretary of Treasury",[68] is exempt from disclosure in any event on the grounds of attorney-client privilege and/or attorney work product. They also contend that No. 90 is attorney product.

The essence of attorney-client privilege is "full and frank communication between attorneys and their clients". *Upjohn Company* v. *United States,* 449 U.S. 383, 389 (1981). To the extent the Secretary of the Treasury is the client[69] for whom attorney Robles draft-

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[67] *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 151–52 (1975) (citations and footnotes omitted).

[68] Affidavit of William Von Raab, para. 4(a) (Nov. 1, 1985). The affidavit of Michael T. Schmitz, Acting Chief Counsel of the Customs Service, apparently sworn to November 7, 1985, characterizes the document's author as a "general attorney" in the Office of the General Counsel.

[69] It has been held that a federal agency can be a "client" and that agency lawyers can function as "attorneys" within the relationship contemplated by the privilege. E.g., *Coastal States Gas Corporation* v. *Department of Energy,* 617 F. 2d 854, 863 (D.C. Cir. 1980).

ed document 13, its contents were never communicated to the Secretary according to the Schmitz affidavit, and those contents therefore are not protected from disclosure on the ground of attorney-client privilege. On the other hand, it is clear to the court from a reading of the document that it meets the traditional definition of attorney work product, namely, materials prepared by a lawyer "acting for his client in anticipation of litigation." *Hickman* v. *Taylor,* 329 U.S. 495, 508 (1947).

> At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case.[70]

Document 13 lies within this privileged area.

This is also true of document 90, which is dated within the time of this litigation, which relates to the matters at issue in the action and which was prepared in the name of the Acting Chief Counsel for the Assistant General Counsel.

In summary, the court's review *in camera* of the documents has led it to conclude that Nos. 13, 60 (except for the last page) and 90 are privileged and also that no part of Nos. 19, 53, 54, 70, 111, 116 or 117 is privileged.

Plaintiffs' motion to compel relies, in part, on CIT Rule 26(b)(3) in attempting to convince the court that they have such a substantial need for the privileged documents as to warrant requiring their production. This plea is unconvincing. In fact, their extensive papers on this and the other motions discussed herein reveal a substantial accumulation of information regarding the matters at issue. Moreover, while this court has permitted the plaintiffs necessary and appropriate discovery per Slip Op. 85–105 on the basis that no absolute privilege attaches to the administrative decision-making process, this ruling was not a predetermination that no element of that process could be beyond discovery on the ground of executive privilege, nor was it to be interpreted as a blanket overruling of the privileges attaching to the legal advice and litigation work of attorneys.

With the court's determination to order the defendants to disclose to plaintiffs' counsel the redacted parts of documents 19, 53, 54, 70, 111, and 117[71], defendants' contingent request is that this determination be certified for interlocutory appeal pursuant to 38 U.S.C. § 1292(d)(2) on the ground, among others, that "an immediate appeal would materially advance the termination of this litigation."[72]

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[70] *United States* v. *Nobles,* 422 U.S. 225, 238 (1975).

[71] The court agrees with the defendants that Nos. 19, 70 and 111 contain business confidential information to be disclosed to counsel only pursuant to protective order. *See* Part VI, *infra.*

Having completed its review *in camera,* the court will reseal the contested documents in the envelopes in which they were delivered, and it will direct the Clerk to maintain them under that seal under further order.

[72] Defendants' Documents Memorandum, p. 15.

Review of the documents, however, makes this assertion difficult to accept. Furthermore, the court notes that in *Zenith Radio Corporation* v. *United States,* 7 CIT ——, 588 F. Supp. 1443 (1984), *rev'd,* 764 F. 2d 1577 (Fed. Cir. 1985), the trial judge granted the government's request for immediate appellate review of his order requiring disclosure of allegedly privileged documents and information. The matter was certified on August 8, 1984, and the circuit court permitted the appeal on August 30th. But that court's decision was handed down on June 19, 1985.

Of course, overruling claims of privilege is a serious matter—one which requires the greatest of care on the part of a court. But a court is also responsible for supervising orderly proceedings—in the interests of justice and fairness to all parties. Here, those interests would not be best served by granting defendants' motion, which therefore must be denied in the exercise of sound discretion.[73]

V

The Deputy Director of the Classification and Value Division of the Customs Service appeared for deposition by the plaintiffs on October 15 and 16, 1985. On October 21st, the Director of that division was deposed by plaintiffs' counsel.

During those depositions, defendants' counsel directed the witnesses not to answer certain questions. The plaintiffs now move to compel answers to them. In response to the motion, defendants' counsel have withdrawn their objections to some of the questions [74], while arguing that the remaining questions "were objectionable because they invaded areas which are exempt from discovery on the grounds of Governmental privilege" [75] citing *Zenith Radio Corporation* v. *United States,* 764 F.2d at 1580:

> * * * The executive privilege, which has been analogized to the work product privilege, protects agency officials' deliberations, advisory opinions and recommentations in order to promote frank discussion of legal or policy matters in the decision-making process.

The precise issue in that case was whether the government had waived its privilege as to certain documents. In concluding that the trial court erred in ordering their production, the Federal Circuit indicated, however, that the information requested was subject to determination on deposition as follows:

> The question whether the government was entitled to recover interest under the settlement agreements is an issue of law, the answer to which turns upon an interpretation of those agreements. * * * If the views of the parties to or the drafters of the settlement agreements are pertinent to the resolution of

[73] In denying the motion for certification, the court also denies defendants' request for a ten-day stay in which to perfect an appeal.

[74] *See* Defendants' Depositions Memorandum, p. 2.

[75] *Id.* at 3 (footnote omitted).

> that legal issue * * * Zenith has not given any convincing reason why it would not obtain that information by deposing those individuals. 764 F.2d at 1580.

The opportunity to take depositions of such individuals, however, is not an automatic grant to discover that information which is genuinely privileged. On the other hand, as this court indicated in Slip Op. 85–105, the defendants have yet to present formal administrative findings upon which the contested revocation ruling was based, and, in the absence of such findings, "it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves." *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 420 (1971).

Upon review and reflection, this court concludes that the questions contested by defendants' counsel led, with few exceptions, to erroneous directions to the witnesses not to answer on the ground of privilege. Questions such as "Would you elaborate on what you mean by reliance?" [76] and "By what date must they have entered into the business negotiations, the relevant business negotiations?" [77] and "What is your understanding of the factors that influenced the Service's case-by-case determination?" [78] hardly are aimed at the heart of the process which resulted in the August 2, 1985 agency decision. Reliance, for example, is an issue which that decision has created, and which is independent of any role it may have played in reaching the decision.

Specifically, the plaintiffs are entitled to answers from deponent Roth to each of the foregoing questions, as well as to each of the following questions: page 48, lines 15–18; [79] p. 126, lines 8–10; p. 131, lines 4–6; p. 133, lines 19–22; p. 199, lines 17–20; p. 200, lines 2–6 and 10–13; p. 212, line 13; p. 214, lines 2–7; p. 217, line 20 to p. 218, line 1; p. 218, line 21 to p. 219, line 3; p. 220, line 20 to p. 221, line 1; p. 221 lines 5–7 and 11–14; p. 254, line 19 to p. 255, line 2; p. 255, line 7; p. 255, line 22 to p. 256, line 1; p. 271, lines 9–13; p. 279, lines 11–12; p. 296, lines 17–19; p. 299, lines 19–21; p. 302, lines 12–18; and p. 303, lines 5–8. In fact, a question [p. 299, line 6] which resulted in a proper direction not to answer was aimed at attorney-client advice and not executive privilege.

After review of the transcript of the deposition of deponent Fox, the court concludes that the plaintiffs are entitled to answers to each of the following questions: page 62, line 17; [80] p. 63, line 21 to p. 64, line 1; p. 64, lines 4–7; p. 68, lines 1–3, 7–9, 12–13 and 17–19; p. 68, line 22 to p. 69, line 3; p. 79, lines 6–7; p. 91, lines 14–15; and p. 98, line 14.

As with the decisions in Parts I and IV, above, the defendants request certification pursuant to 28 U.S.C. § 1292(d)(2) because, they

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[76] Appendix B to Plaintiffs' Supplemental Memorandum, p. 125, line 12.
[77] *Id.*, p. 213, lines 9–10.
[78] *Id.*, p. 279, lines 11–12.
[79] Such references are to Appendix B to Plaintiffs' Supplemental Memorandum.
[80] Such references are to Appendix D to Plaintiffs' Supplemental Memorandum.

allege, answering the foregoing questions "would result in irreparable injury to the Government." [81] The court cannot concur in this prediction, and the motion and concomitant request for a stay to perfect an appeal must therefore be denied.

VI

The defendants have produced confidential business information to the plaintiffs and intervenor-defendant RAJ Chemicals on the basis of confidentiality agreement(s) among counsel. The defendants have filed a motion for a protective order, incorporating the terms and conditions of their agreement(s). The motion is granted, and their revised proposed form of order will be entered.[82]

Citicorp International Trading Company, Inc. has brought a motion to intervene in this action as a party defendant pursuant to CIT Rule 24, subsection (a) of which provides, in part:

> Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action * * * (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by the parties.

The proposed intervenor appears to meet this criterion, and its motion is granted, subject, however, to strict adherence to the representation in the papers that "Citicorp will not delay or prejudice adjudication of the rights of the original parties" and "will not seek to delay or duplicate any of the discovery already under way" in view of the timing of the motion.

The Commonwealth of Kentucky, by its Attorney General, has filed a motion for leave to submit a brief as *amicus curiae.* In granting the motion, the court construes it to be in connection with trial of this action.

* * * * * * *

Now, therefore, in view of the foregoing, it is

Ordered that defendants' motion to dismiss the complaint be, and it hereby is, denied; and it is further

Ordered that the motion of intervenor-defendant RAJ Chemicals, Inc. to dismiss the complaint be, and it hereby is, denied; and it is further

Ordered that defendants' motion for certification of an interlocutory appeal from the court's denial of their motion to dismiss the complaint be, and it hereby is, denied; and it is further

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[81] Defendants' Depositions Memorandum, p. 7.

[82] Both intervenor-defendant RAJ Chemicals and intervenor-defendant Certified Oil Company have filed motions for orders providing particular protection for their respective commercial documents and information. The court is of the view that entry of, and strict adherence to, defendants' proposed order will adequately cover their concerns, and the motions of those two intervenor-defendants are therefore denied.

Ordered that plaintiffs' motion for rehearing and a preliminary injunction be, and it hereby is, denied; and it is further

Ordered that plaintiffs' motion to compel production of documents be, and it hereby is, granted in part and denied in part as per Part IV of the foregoing opinion; and it is further

Ordered that defendants' motion for certification of an interlocutory appeal from the court's decision of plaintiffs' motion to compel production be, and it hereby is, denied, and it is further

Ordered that plaintiffs' motion to compel answers to certain deposition questions be, and it hereby is, granted in part and denied in part as per Part V of the foregoing opinion; and it is further

Ordered that defendants' motion for certification of an interlocutory appeal from the court's decision of plaintiffs' motion to compel answers be, and it hereby is, denied; and it is hereby futher

Ordered that defendants produce to the plaintiffs the aforesaid documents and answers on or before December 4, 1985; and it is hereby further

Ordered that the Clerk maintain under seal until further order of the court those documents submitted to it for *in camera* review by the defendants; and it is further

Ordered that defendants' motion for a protective order as to confidential business information be, and it hereby is, granted; and it is further

Ordered that the motion of intervenor-defendant RAJ Chemicals, Inc. for a protective order as to confidential business information be, and it hereby is, denied; and it is further

Ordered that the motion of intervenor-defendant Certified Oil Company for a protective order as to confidential business information be, and it hereby is, denied; and it is further

Ordered that the motion of Citicorp International Trading Company, Inc. for leave to intervene as a part defendant be, and it hereby is, granted; and it is further

Ordered that the motion of the Commonwealth of Kentucky for leave to file a brief *amicus curiae* be, and it hereby is, granted; and it is hereby further

Ordered that trial of this action commence in Ney York City at 10 a.m. on the 9th day of December 1985.

(Slip Op. 85–120)

EAC ENGINEERING DIVISION OF THE EAST ASIATIC COMPANY, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Before RE, *Chief Judge.*

Court No. 82-1-00096

Memorandum Opinion and Order

(Decided November 26, 1985)

Metzger, Shadyac & Schwartz (*Carl Schwartz* and *Wesley K. Caine*), for the plaintiff.

Richard K. Willard, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Office, Commercial Litigation Branch (*Jerry P. Wiskin*), for the defendant.

RE, *Chief Judge:* This memorandum opinion and order is being issued to set forth an appropriate schedule to implement this Court's memorandum opinion and order dated October 24, 1985, *EAC Engineering Div. of the East Asiatic Co.* v. *United States*, 9 CIT ——, Slip Op. 85-111 (October 24, 1985).

The question presented in this case pertains to the proper classification, for customs duty purposes, of certain merchandise imported from the Federal Republic of Germany, and described on the customs invoices as "spark detection systems." Customs had classified the merchandise as "optical instruments" under item 712.05, TSUS.

Plaintiff protested this classification, contending that the merchandise was properly classifiable under item 712.15, TSUS, as "Instruments and apparatus for measuring or detecting alpha, beta, gamma, X-ray, cosmic or similar radiations, and parts thereof." Alternatively, plaintiff claimed that the merchandise was classifiable under item 712.49, TSUS, a "basket" provision for electrical measuring and checking instruments, or under items 688.40 and 688.45, TSUS, depending on the year of importation, as electrical articles not specially provided for.

On the parties' cross-motions for summary judgment, this Court determined that the Customs Service's original classification of the imported "spark detectors" as "optical instruments" under item 712.05, TSUS, was incorrect. In its brief, the defendant conceded that, if the imported spark detectors had been improperly classified as "optical instruments," they were classifiable as "other" electrical measuring, analyzing, or automatically controlling instruments and appartus under item 712.49, TSUS. Notwithstanding the concession, there was still a question whether the merchandise was properly classifiable under that "basket" provision, or under the more specific provision for radiation measuring or detecting equipment, item 712.15. Since material issues of fact pertaining to these alternative classifications remained unresolved, the Court remanded the action to the Customs Service. The remand was intended to permit the Customs Service to consider the plaintiff's proposed alternative classifications at the administrative level, and to determine the appropriate classification of the imported merchandise.

Remand to the Customs Service in a classification case is a novel procedure which had not been authorized prior to the Customs

Courts Act of 1980. Hence, it is appropriate to set forth a procedure for the remand that will expedite resolution of the relevant issues, and conserve judicial and administrative resources.

Prior to the 1980 Act, the Court had no power to reclassify merchandise if the plaintiff's proposed classification was not proven correct, even when the government's classification was clearly incorrect. Since, under the former procedure the function of the Court was to pass upon the validity of plaintiff's protest, "rather than on the merits of the case," the court would overrule the protest "without affirming the classification." *See, e.g., Mitsubishi International Corp.* v. *United States,* 78 Cust. Ct. 4, 20, C.D. 4686 (1977); *In re Solvay Process Co.,* 134 F. 678, 680 (C.C.N.D.N.Y. 1905). In order to remedy the unfairness that on occasion resulted from this rule, Congress amended the statute to mandate that a correct classification be reached in every case. *EAC Engineering, supra,* 9 CIT at ——, Slip Op. at 18. To achieve this result, the Court itself may determine the correct classification, or remand the case to the administrative agency. *Id.* (quoting *Jarvis Clark Co.* v. *United States,* 733 F.2d 873, 878 (Fed. Cir. 1984)). In *Jarvis Clark Co.* v. *United States,* 733 F.2d 873 (1984), the Federal Circuit explained: "By granting the power to remand or to retry an action, § 2643(b) eliminates the dual burden's potential for unfairness while providing the government an opportunity to develop evidence as to classifications not previously considered." *Id.* at 877.

In this case, since material issues of fact remained unresolved, the Court remanded the case to allow the Customs Service, in the first instance, to consider the plaintiff's proposed alternative classifications, and determine the appropriate classification of the imported merchandise. The remand was intended to permit the agency to exercise its expertise on the questions presented, and to conserve judicial and administrative resources. Thus, even if the plaintiff were to challenge Custom's determination on remand, and the proper classification would ultimately have to be judicially decided, the Court would nevertheless benefit from the administrative consideration and determination.

As a general principle of administrative law, a court remanding an action to an agency usually will allow the agency to determine the proper procedure or method to effectuate the court's order. *See, e.g., FPC* v. *Transcontinental Gas Pipe Line Corp.,* 423 U.S. 326, 333 (1976); *Freeport Minerals Co.* v. *United States,* 758 F.2d 629, 636 (Fed. Cir. 1985); *cf. Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.,* 435 U.S. 519, 544–45 (1978). In this case, however, in order to permit the most efficient and economic resolution of this dispute, it is appropriate for the Court to retain jurisdiction, and to set forth a schedule for the remand.

If the classification issue remains in dispute after Customs' redetermination, it would be an unnecessary waste of judicial and administrative resources to required Customs to reliquidate the mer-

chandise, and the plaintiff to file a second protest and commence a new action in order to obtain judicial review. By retaining jurisdiction, the Court does not intend to interfere in any way with the agency's procedures or processes for determining the proper classification of the merchandise on remand. Rather, the retention of jurisdiction will permit the classification issue, if it is still in dispute, to be judicially decided without unnecessary cost and delay. To require the parties to repeat the normal or usual procedural formalities would be little more than an empty and costly gesture that would frustrate a major purpose in remanding the action, that is, the expeditious resolution of this dispute. Accordingly, it is hereby

Ordered, that the Customs Service shall determine the proper classification of the merchandise that is the subject matter of this action, and shall notify the plaintiff and this Court in writing of its determination within 60 days of the date of this order. It is further

Ordered that the plaintiff, if it is dissatisfied with Customs' determination, shall have 30 days from the date of service of Customs' determination on remand within which to file a motion for summary judgment, or a proposed scheduling order pertaining to the further prosecution of this action; and it is further

Ordered that if the Plaintiff does not file a motion for summary judgment or a proposed scheduling order within 30 days of service of Customs' determination, this Court shall enter a final judgment ordering Customs to reliquidate the subject merchandise in accordance with Customs determination on remand.

SO ORDERED

ABSTRACTED

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSE
				ITEM N RA
P85/251	Restani, J. November 14, 1985	J.I. International Service	84-9-01287	Item 700. 4
P85/252	Restani, J. November 14, 1985	Lloyd's Electronics Int'l.	85-2-00270	Item 685. 685.50, 8.2%, 8.5% Item A68 Free
P85/253	Restani, J. November 14, 1985	Russ Berrie & Co.	83-6-00861	Item 737. 17-5%
P85/254	Restani, J. November 22, 1985	C.J. Tower & Sons of Buffalo, Inc.	84-2-00277	Item 610. 10.

CTED PROTEST DECISIONS

ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
ITEM NO. AND RATE	ITEM NO. AND RATE		
em 700.64 48%	Item 700.56 6%	Agreed statement of facts	Los Angeles Tonged sandals
em 685.24, 685.50, or 684.62 8.2%, 5.9%, or 8.5% em A684.62 Free of duty	Item 678.50 4.2% or 4.4%	Agreed statement of facts	New York Solid state digital AM/FM timekeeping radio/cassette/telephone combinations incorporating speakerphones
em 737.40 17-5% or 16.2%	Item A737.40 Free of duty pursuant to GSP	Agreed statement of facts	Miami Toy figures of animate objects, not stuffed, of plush material
em 610.80 10.2%	Item 666.00 Free of duty	C.J. Tower & Sons of Buffalo, Inc. v. U.S., 673 F.2d 1268 (1982)	Buffalo Hog nipplers, stems and bodies

ABSTRACTED PROTEST DEC

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED
				ITEM NO. AND RATE
P85/255	Restani, J. November 22, 1985	Leisurecraft Products, Ltd.	84-1-00096	Item 715.05 (716.14/716.18) Various rates for modules Item 720.24 or 720.28 Various rates for cases Item 740.35 Various rates for bands Merchandise above marked "A" and "B"

T DECISIONS—Continued

ED AND	HELD ITEM NO. AND RATE	BASIS	PORT OF ENTRY AND MERCHANDISE
3.18) es for e or es for es for above " and	Item 688.36 5.5%, 5.3% 5.1%, or 4.9%, items marked "A" Item 656.25, 657.35, or 657.25 Various rates, items marked "B"	Agreed statement of facts	New York Electronic LCD watches, solid state digital modules, cases, and bands for solid state digital timepieces with buttons for activating the desired display, items marked "A" and "B"

ABSTRACTED REAP

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS O VALUATI
R85/486	Restani, J. November 18, 1985	Zayre Corp.	83-11-01673	Transaction va
R85/487	Watson, J. November 21, 1985	Safeway Stores, Inc.	R61/9389, etc.	Export value
R85/488	Watson, J. November 25, 1985	Freedman & Slater, Inc.	R60/21817, etc.	Export value

REAPPRAISEMENT DECISIONS

ASIS OF LUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
ction value	Represented by contract price for merchandise which is $13,403.00	Agreed statement of facts	Savannah Children's parkas
value	Various f.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values, net packed	Agreed statement of facts	Baltimore Tuna in brine
value	Appraised unit values less 7.5% thereof net packed	Agreed statement of facts	New York Transistor radios together with their accessories and parts; an entirety

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NOTICE

The listing of abstracts under the categories "Abstracted Protest Decisions" and "Abstracted Reappraisement Decisions" in the weekly CUSTOMS BULLETIN and the *United States Court of International Trade Reports* will be discontinued as of December 31, 1985. Beginning January 1, 1986, abstracts of decisions in classification and valuation cases will be listed under the categories "Abstracted Classification Decisions" and "Abstracted Valuation Decisions" and given a C86/— or V86/— abstract number. These modifications are consistent with changes in the administration of the Customs laws and the decisions rendered by the Court.

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U.S. Customs Service

Treasury Decisions

U.S. Court of International Trade

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